Supreme Court, U.S.
FILED
JUL 8 - 2004

No. 04 51

In The
Supreme Court of the United States

JOHN HOWARD, ET AL.,

Petitioners,

v.

SOUTHERN ILLINOIS RIVERBOAT/CASINO CRUISES, INC. d/b/a PLAYERS ISLAND CASINO, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

GAIL GAUS RENSHAW*
ROY C. DRIPPS
THE LAKIN LAW FIRM
300 Evans Avenue
P.O. Box 229
Wood River, IL 62095

Phone: (618) 254-1127
Fax: (618) 254-3032

Counsel for Petitioners
**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Can a vessel owner preclude, as a matter of law, a determination that its vessel is "in navigation" by declaring the owner's subjective intent that the vessel will remain moored on navigable waters even though the fully functional vessel continues to engage in its customary and substantial commercial activity?

PARTIES TO THE PROCEEDINGS

Petitioners are the following individuals, who were the plaintiffs below:

Grace A. Alexander
Jerrie M. Belcher
Valerie Carroll
Anita A. Clayton
Cecelia Cook
Troy A. Davis
Debra J. Eastwood
Mona Ellis
Jeane C. Findley
Roy "Neal" Ford
John B. Fugate, IV
John M. Gregg
Judy Grimes
Shawn Hargan
Dana M. Hocker
John P. Howard
Brecia Huie
Shirley A. Johnson
Kathy L. Lay
Patricia Ledsinger
Kenneth R. Litchford
Robin L. Little
Wilma Lott
George P. Mabrey
Virginia R. Madden
J. Richard Matheny
Joan Misch
Keith E. Plumlee
Kitty Polovina
Zenon Rodriguez
Julia B. Salyer
Bonnie G. Shelton
Pamula D. Shinn
Robert E. Spain, Jr.
Pamela L. Taylor
Belinda S. Thomas
Michael W. Thomas
Nancy A. Williams
Lori A. Wurth

The Respondents are, Southern Illinois Riverboat/ Casino Cruises, Inc., d/b/a Players Island Casino, the defendant below, and Triangle Enterprises, Inc. d/b/a Triangle Insulation and Sheet Metal Company, the third-party defendant below.

SUPREME COURT RULE 29.6
DISCLOSURE STATEMENT

Caption: *John Howard, et al. v. Riverboat/Casino Cruises, Inc. v. Triangle Enterprises, In., d/b/a Triangle Insulation and Sheet Metal Co.*

The Petitioners are individuals with no corporate status or affiliations.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceedings	ii
Supreme Court Rule 29.6 Disclosure Statement	iii
Table of Contents	iv
Table of Authorities	vi
Opinions Below	1
Jurisdiction	1
Statutory Provision Involved	2
Statement of Case	2
Reason for Allowance of the Writ	4
I. The Decision In This Case Merits Review Because Its Holding That A Vessel Ceases Being A "Vessel In Navigation" Under The Jones Act As A Matter Of Law On A Vessel Owner's Statement Of Subjective Intent To Remain Moored In The Future Even Though The Vessel Remains Fully Functional, Afloat On Navigable Waters Conducting Substantial Commercial Activities On Board Conflicts With Prior Interpretations Of Jones Act Seaman Status Given By This Court	5
A. Aid In Navigation Is Not Required To Establish Seaman Status	6
B. A Vessel Remains "In Navigation" While Berthed Or Even In Drydock	7
C. "In Navigation" Includes "In Commerce"	9

TABLE OF CONTENTS – Continued

Page

D. The "Purpose" Analysis Is Only Applicable To Unconventional Craft Whose Status Is Unsettled 10

CONCLUSION 11

Appendix ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Butler v. Whiteman, 356 U.S. 271 (1958) 9

Chandris, Inc. v. Latsis, 515 U.S. 347 (1995) 4, 7, 8, 9

Digiovanni v. Traylor Bros., Inc., 959 F.2d 1119 (1st Cir.) (en banc), *cert. denied*, 506 U.S. 827 (1992) 8

Gremillion v. Gulf Coast Catering Co., 904 F.2d 290 (5th Cir. 1990) 10

Johnson v. John F. Beasley Construction Co., 742 F.2d 1054 (7th Cir. 1984), *overruled on other grounds, McDermott International, Inc.*, 498 U.S. 337 (1991) 4, 7, 8, 9

McCarthy v. The Bark Peking, 716 F.2d 130 (2d Cir. 1983) 8

McDermott International, Inc. v. Wilander, 498 U.S. 337, 112 L.Ed. 2d 866, 111 S.Ct. 807 (1991) 6

Offshore, Co. v. Robison, 266 F.2d 769 (5th Cir. 1959) 6

Senko v. LaCrosse Dredging Co., 352 U.S. 370 (1957) 7

United States v. Thompson, 1 Sumn. 168, 28 F.Cas. 102 6

STATUTES AND RULES

1 U.S.C. §3 7

28 U.S.C. §1331 1

28 U.S.C. §1292(b) 1

28 U.S.C. §1254(1) 1

TABLE OF AUTHORITIES – Continued

Page

46 U.S.C. §681 2

46 U.S.C. §688 ..... 2, 5, 11

OTHER AUTHORITIES

2 M. Norris, Law of Seamen §30.13 p. 364 8

OPINIONS BELOW

The memorandum and order of the United States District Court for the Southern District of Illinois denying defendants' motions for summary judgment and certifying an issue for interlocutory appeal is reprinted here as Appendix C. The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 364 F.3d 854 (7th Cir. 2004) and is reprinted here as Appendix A. The unreported order by the United States Court of Appeals for the Seventh Circuit denying a petition for rehearing and suggestion for rehearing *en banc* is reprinted here as Appendix D.

JURISDICTION

The United States District Court for the Southern District of Illinois had subject matter jurisdiction pursuant to 28 U.S.C. §1331. The United States Court of Appeals for the Seventh Circuit had jurisdiction pursuant to 28 U.S.C. §1292(b) as the district court certified the issue involved, finding the issue presented a question of controlling law not previously decided by the United States Court of Appeals for the Seventh Circuit and that an immediate appeal would expedite the resolution of the litigation. The Seventh Circuit Court of Appeals issued the opinion below on April 9, 2004. The Seventh Circuit Court of Appeals denied a request for rehearing and rehearing *en banc* on May 17, 2004. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

This case involves The Jones Act, 46 U.S.C. §681 *et seq.*, specifically §688(a), which provides a cause of action for damages for "any seaman who shall suffer personal injury in the course of his employment . . . "

STATEMENT OF CASE

At all relevant times, the *M/V Players II* was a riverboat casino located on the Ohio River in Maasac County, Illinois. To begin operations in Illinois, the *Players II* was brought from Lake Charles, Louisiana under its own power with two assist boats. In September of 2001, the *Players II* was replaced by the *M/V Harrah's Northstar* and moved to Texas under its own power.

The *Players II* was a U.S. Coast Guard inspected vessel, with two engines used for propulsion, which employed a captain and crew qualified to navigate the vessel. As a Coast Guard inspected vessel, the *Players II* was required to carry the following documentation: Certificate of Inspection, Certificate of Documentation, Certificate of Financial Responsibility (water pollution), Ship/Aircraft Radio Station License, Tonnage Certificate, and a stability letter. The U.S. Coast Guard does nothing whatsoever with regard to the gaming function of the vessel.

According to the September 28, 2001, Certificate of Inspection, the *Players II* is required to have a minimum crew of a master, chief engineer, nine deckhands and four watchmen. Additionally, the Coast Guard required that the *M/V Players II* have two rescue boats, eight inflatable rafts, 1904 life preservers, and six ring buoys, along with

particular fire fighting equipment. The *Players II* also had all the aids to navigation, including a working bridge, with radar, radios, a depth finder, throttles, and controls for steering.

The *Players II* left the dock during Coast Guard inspections. The vessel was required to do weekly man-overboard, fire and emergency, abandon ship and allision or collision drills; the vessel was also required to do a monthly emergency generator test. There were also inspections to prove propulsion conducted, during which the vessel left its moorings. They were conducted at a maximum of once every three months.

To cruise, the crew simply had to disconnect the vessel from the dock, which in an emergency situation could be accomplished in fifteen-twenty minutes. In July and August of 2000, there was nothing about the river, which prevented it from cruising. Further, the vessel's engine and navigational aides were all fully functional in July and August 2000.

Finally, although a representative of defendant corporation stated in an affidavit that defendant did not intend to use the vessel for transport, it never notified the Coast Guard of an intent to surrender its Certificate of Inspection, nor has the vessel ever applied for permanent mooring status.

Petitioners, forty-five employees of Southern Illinois Riverboat Casino Cruises, Inc. ("Southern") and one patron, who all sustained injuries from chemical exposure while on board the defendant's riverboats that was used for gaming filed a Jones Act and general maritime law cause of action in the District Court of the Southern District of Illinois. Defendant filed a Limitation of Liability proceeding in the

Southern District of Illinois. Defendant Triangle Insulation was named as a Third-Party defendant. The defendants filed Summary Judgment Motions, which were denied on August 19, 2002. However the district court certified the issue as to whether the *M/V Players Casino II* was a vessel in navigation under the Jones Act, for interlocutory appeal. This Court granted the defendants' Petitions For Permission To Appeal on October 10, 2002. On April 9, 2004 the United States Court of Appeals for the Seventh Circuit issued an opinion reversing the district court. Plaintiffs filed a petition for rehearing and suggestion for rehearing *en banc*, which was denied on May 17, 2004. Plaintiffs timely filed this Petition for a Writ of Certiorari.

REASONS FOR ALLOWANCE OF THE WRIT

The United States Court of Appeals for the Seventh Circuit found the *Players II* was not a vessel in navigation because the defendant claimed *Players II* was moored and would not leave dockside in the future. This decision conflicts with this Court's prior cases interpreting Jones Act seaman status, *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995) and further conflicts with the Seventh Circuit's prior decision, *Johnson v. John F. Beasley Construction Co.*, 742 F.2d 1054 (7th Cir. 1984), *overruled on other grounds*, *McDermott International, Inc.*, 498 U.S. 337 (1991), by applying an impermissibly restrictive interpretation to the term "vessel in navigation."

The interpretation of the term "vessel in navigation," as used to determine "seaman" status under the Jones Act is an issue that remains undecided by this Court and

profoundly affects a multitude of persons employed in the riverboat gaming industry, who are injured in the course of their employment. This Court recently granted certiorari in a case with a related but distinct issue. That case, *Stewart v. Dutra Construction Co.*, No. 03-814 presents the question of whether a special-purpose watercraft (such as a dredge) is a Jones Act "vessel"? While this Court will indeed resolve one source of confusion surrounding the meaning of "vessel in navigation" with a decision in *Stewart*, the question of what moored vessels and what activities vessels must be engaged in to fall within the term "vessel in navigation" will go unanswered and the issue will continue to be litigated with less than uniform results. If this Court grants the Petition For Writ in the case at bar, however, the entire "vessel in navigation" issue can be laid to rest within a short time span. Many of the decisions in the lower courts confuse the issue in *Stewart* with the issue presented herein, viewing them as one. Allowing certiorari in this case would result in a consistent interpretation of the term "vessel in navigation."

I. The Decision In This Case Merits Review Because Its Holding That A Vessel Ceases Being A "Vessel In Navigation" Under The Jones Act As A Matter Of Law On A Vessel Owner's Statement Of Subjective Intent To Remain Moored In The Future Even Though The Vessel Remains Fully Functional, Afloat On Navigable Waters Conducting Substantial Commercial Activities On Board Conflicts With Prior Interpretations Of Jones Act Seaman Status Given By This Court.

The Jones Act (46 U.S.C. §688) provides benefits to the members of the crew of a vessel for injuries resulting

from employer negligence. *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 347, 112 L.Ed. 2d 866, 111 S.Ct. 807 (1991). In *Wilander*, this Court approved the seaman status test first formulated by the Fifth Circuit in *Offshore, Co. v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959). That multi-pronged test required submission to a jury if there was evidence that (1) the injured worker was assigned permanently to a vessel or performed a substantial part of his work on the vessel and (2) the duties performed contributed to the function of the vessel or its mission's accomplishment or to the operation or welfare in terms of maintenance during movement or anchorage.

A. Aid In Navigation Is Not Required To Establish Seaman Status

Before 1991 some courts required that a putative seaman aid in the navigation of the vessel. In that year, this Court adopted the *Robison* test and held that an employee need not aid in the navigation of his assigned vessel but need only further the mission of that vessel to qualify as a Jones Act seaman. *McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991). The jury and appellate court's determination that Wilander was a seaman even though he had no navigation duties at all was affirmed.

This Court held that the "key to seaman status is employment-related connection to a vessel in navigation." 498 U.S. 337, 355. The Court noted that a cooper, a pilot, a surgeon, a ship-carpenter and a boatswain are all seamen. 498 U.S. 337, 345 *citing United States v. Thompson*, 1 Sumn. 168, 28 F.Cas. 102 (No. 16,494) (CC Mass) (per Story, J.). Thus, it is not necessary to seaman status that

the employee aid in navigation of the vessel or even have any navigation duties at all.

B. A Vessel Remains "In Navigation" While Berthed Or Even In Drydock

Congress has defined a vessel to include "every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. §3. Because the *Players II* has its own motive power and meets the requirement of this definition, it is unquestionably a vessel.

It is well-established that a vessel is "in navigation" while moored in navigable waters. *Senko v. LaCrosse Dredging Co.*, 352 U.S. 370, 373 (1957). The Court there held that a member of a ships crew is covered by the Jones Act even if the ship is confined to berth for lengthy periods. 352 U.S. 370, 373.

This Court in *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995) noted that seaman status did not require "that a maritime employee must work *only* on board a vessel to qualify as a seaman under the Jones Act." 515 U.S. 347, 363. It approved a rule of thumb that a "worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act."

The *Chandris* holding is a tacit approval of the Seventh Circuit's vessel analysis in *Johnson v. John F. Beasley Construction Co.*, 742 F.2d 1054, 1063-1064 (7th Cir. 1984), *overruled on other grounds, McDermott International, Inc. v. Wilander*, 498 U.S. 337, *supra*. The Seventh Circuit there held that "the injured employee does not cease

becoming a member of a crew if the vessel is docked or anchored at the moment of injury." The "in navigation" requirement was to be used in its broad sense, and not confined strictly to the actual navigating or movement of the vessel. The term was held to mean that the vessel is engaged as an instrument of commerce or transportation on water. "Indeed, so long as the vessel is upon navigable waters, an injured Jones Act seaman may recover for injuries suffered while on the wharf." *Johnson,* 742 F.2d 1054, 1063-1064. *Chandris* agreed with the Court of Appeals that the district court had erred in concluding that the vessel was not "in navigation" while it was in drydock, holding a vessel did not cease being a vessel when not voyaging, but is at anchor, berthed, or at dockside. 515 U.S. at 376, *quoting Digiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119, 1121 (1st Cir.) (en banc), *cert. denied*, 506 U.S. 827 (1992). A vessel would still be a vessel, although moored to a dock, if it remained ready for another voyage. 515 U.S. at 374, *quoting* 2 M. Norris, Law of Seamen §30.13, p. 364 (emphasis added). It is only when a vessel is "transformed through 'major' overhauls or renovations" that it ceases to be "in navigation." 515 U.S. at 374. The Court stated that a six-month period in which a vessel is out of service was relatively minor by maritime standards. *Id. cf. McCarthy v. The Bark Peking*, 716 F.2d 130, 136 (2d Cir. 1983) (museum ship permanently moored for over 50 years with rudder welded in place was still a vessel because it rested on navigable waters and could return to sea, even if only in tow). This issue is fact intensive and is one that must be presented to the trier of fact for the purpose of weighing conflicting evidence; it should not be decided as a matter of law, except in the rarest of circumstances, *Chandris*, 515 U.S. at 376, where all facts

and inferences would take a particular structure outside any permissible understanding of the term.

C. "In Navigation" Includes "In Commerce"

In *Johnson v. John F. Beasley Construction Co.*, 742 F.2d 1054, 1063-1064 (7th Cir. 1984), the Seventh Circuit held that the term "in navigation" is used in a broad sense and does not mean actual movement of the vessel. Instead it means that the vessel is an "instrument of commerce or transportation on water." *Johnson* at 1064. Commerce and transportation on water are used in the disjunctive, which means that the transportation function is not essential to satisfying the test in this case. Clearly, most vessels are instruments of commerce because they charge money to move goods or passengers over the water. However, defendant's gambling boat makes money whether or not it moves passengers or goods. Thus, it is always in commerce or navigation regardless of its physical movements.

The *Players II* is clearly an instrument of commerce and it was a vessel in the traditional sense of the word, with the physical characteristics of a vessel and the ability and readiness to cruise a navigable river. The fact that it was moored at the time of injury does not remove it from navigation, as a matter of law. Thus, the Seventh Circuit's opinion, that a floating gambling casino, which does not cruise on water with their customers as a matter of law is not a vessel in navigation – is simply wrong and conflicts with the broad interpretations previously given. This Court has typically applied a broad view of what constitutes a "vessel in navigation" to effectuate the beneficial purposes of the Jones Act, *Chandris*, 515 U.S. at 374. *See also Butler v. Whiteman*, 356 U.S. 271 (1958).

D. The "Purpose" Analysis Is Only Applicable To Unconventional Craft Whose Status Is Unsettled.

The argument that a vessel is not "in navigation" unless its purpose is the transportation of passengers, cargo, or equipment across navigable waters is an inaccurate analysis of the law. This argument inappropriately combines two separate inquiries: first, whether a craft is a "vessel" and second, whether that vessel is in "commerce or navigation." This Court will resolve the former when it decides the pending case, *Stewart v. Dutra Construction Co.*, No. 03-814. An opportunity for resolution of the latter would be provided if the petition for certiorari is granted in the case at bar.

There are numerous cases dealing with the question of whether exotic or unconventional craft, which are not usually used as a means of transport but are designed to float on water qualify as vessels. The "purpose" analysis is only applied when an "unconventional craft" is claimed by the plaintiff to be a vessel. *Gremillion v. Gulf Coast Catering Co.*, 904 F.2d 290 (5th Cir. 1990) provides an example of this analysis conducted by the Fifth Circuit.

The *Players II* is clearly a "vessel" under this analysis. It was built as a passenger vessel. From the time that it was built until the present time, she has always maintained features that would allow it to carry on work as a passenger vessel. It has always had engines, inflatable life rafts, two rescue boats, fifteen hundred personal flotation devices, life rings, and aids to navigation including radar.

Significantly, the vessel has a Coast Guard certificate of inspection. The *Players II* never applied to the Coast Guard to withdraw itself as a licensed passenger vessel

and has never been put into a contained moat of any kind but rather has always been moored on the river. In this circumstance, there is no question that the *Players II* is in fact a "vessel," regardless of defendants' subjective intent with regard to future cruises.

The statement by defendant's agent that it intended to permanently moor the *Players II* cannot be the basis for determination as a matter of law that the *Players II* was not a vessel in navigation. The *Players II* leaves its moorings for the quarterly Coast Guard tests and for dedrifting. The *Players II* maintains fuel, functional engines, navigation and safety aids, and a marine crew. It is also fully capable of cruising up and down the river. It takes approximately fifteen minutes to disconnect the *Players II* from the dock.

In addition to the evidence of *Player's II* capability to cruise in a very short amount of time, there is other evidence in that case to raise the question of navigability, such as the fact that *Players II* never relinquished its certificate of inspection, and did not apply for permanent mooring status. This conflicting evidence and the inferences that can be drawn preclude determining this issue as a matter of law.

CONCLUSION

The petition for writ of *certiorari* should be granted in this case to settle the issue of when it can be determined as a matter of law whether a riverboat used for gaming is or is not a vessel in navigation under the Jones Act, 46 U.S.C. §688, which is a question of significant national

interest and is required to resolve a conflict between the circuits, and this Court's interpretation.

Respectfully submitted,

GAIL GAUS RENSHAW*
ROY C. DRIPPS
THE LAKIN LAW FIRM
300 Evans Avenue
P.O. Box 229
Wood River, IL 62095

Phone: (618) 254-1127
Fax: (618) 254-3032

Counsel for Petitioners
**Counsel of Record*

APPENDIX

A. Opinion entered by United States Court of Appeals for the Seventh Circuit, April 9, 2004 ..... App. 1

B. Order granting Petitions For Leave To Appeal, October 10, 2002 ..... App. 9

C. Memorandum and Order of United States District Court, Southern District Illinois denying Defendants Motion For Summary Judgment And certification for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) August 19, 2002 ..... App. 11

D. Order denying Plaintiffs-Appellees' Petition For Rehearing and Suggestion For Rehearing En Banc, May 17, 2004 ..... App. 24

E. 46 U.S.C. app § 688(a) ..... App. 26

F. Plaintiffs' Memorandum In Opposition To Summary Judgment (with exhibits) ..... App. 28

G. Defendant's Motion For Summary Judgment (with exhibits) ..... App. 104

APPENDIX A

In the

United States Court of Appeals

for the Seventh Circuit

Nos. 02-3818 & 02-3819

JOHN HOWARD, *et al.*,

Plaintiffs-Appellees,

v.

SOUTHERN ILLINOIS RIVERBOAT CASINO CRUISES, INC., doing business as Players Island Casino,

Defendant Third-Party Plaintiff-Appellant,

v.

TRIANGLE ENTERPRISES, INC., doing business as TRIANGLE INSULATION AND SHEET METAL COMPANY,

Third-Party Defendant-Appellant.

Appeals from the United States District Court
for the Southern District of Illinois.
Nos. 00 C 4321 & 01 C 4299 –
G. Patrick Murphy, *Chief Justice.*

ARGUED MAY 20, 2003 – DECIDED APRIL 9, 2004

Before COFFEY, KANNE, and DIANE P. WOOD, *Circuit Judges.*

DIANE P. WOOD, *Circuit Judge*. This controversy arose when 46 individual plaintiffs brought negligence claims under the Jones Act, 46 U.S.C. app. § 688(a), for injuries they allegedly sustained while working aboard a riverboat casino, the *M/V Players II* (*Players II*). *Players II* was permanently moored to the dock at all times pertinent to their claims. The question we must decide is whether this fact is enough to defeat any claim under the Jones Act, which creates a federal negligence remedy for seamen. The district court thought not, but it certified under 28 U.S.C. § 1292(b) the following question for interlocutory review: whether *Players II* was a vessel "in navigation" covered by the Jones Act, such that the plaintiffs employed on board were Jones Act "seamen." We agreed to hear the appeal, and we now reverse.

I

Beginning in 1995, defendant Players Island Casino (Players) operated a gaming casino on *Players II*, a riverboat casino located on the Ohio River near Metropolis, Illinois. At that time under Illinois law, gaming casinos could be operated only on licensed self-propelled excursion boats that cruised along navigable streams. In 1999, the Illinois General Assembly amended the Illinois Riverboat Gambling Act to allow gaming on "permanently moored" barges. 230 ILL. COMP. STAT. 10/4(d) & 10/3(c). Soon thereafter, *Players II* ceased cruising along the Ohio River and (with minor exceptions described below) was permanently moored to the dock. According to an affidavit by the vice president of operations and marketing, Jeff Pfeiffer, Players had no intention of having *Players II* cruise again as part of casino operations.

Plaintiffs claim that they sustained injuries when they were exposed to chemicals while working aboard *Players II* on July 28 and 29, 2000. It is undisputed that at the time of the plaintiffs' alleged injuries, the casino had been docked for more than a year and was not in the business of transporting passengers. It was connected to land-based utilities, including electricity, telephone, water, and sewer. Nevertheless, it could be disconnected from the dock in about 15 to 20 minutes. Moreover, *Players II* was licensed and classified as a passenger vessel with the U.S. Coast Guard and was equipped with firefighting and safety equipment. It also employed a captain and crew qualified to move the casino if necessary. After the 1999 change in Illinois law allowing dockside gaming, however, *Players II* never left its moorings except in connection with propulsion tests required by the Coast Guard. During the propulsion tests (which took about 45 minutes to complete), *Players II* would move out into the river about 100 feet and then return to the dock. By the time of plaintiffs' alleged injuries, the Coast Guard required the propulsion test only once a year. In September 2001, Players removed *Players II* from service as a casino. Some time later, it sailed under its own power to Texas to await sale.

Defendant Players and third-party defendant Triangle Insulation and Sheet Metal Company (Triangle) filed motions for summary judgment in district court, seeking dismissal of the plaintiffs' claims on the grounds that *Players II* was not a vessel "in navigation" and thus the plaintiffs were not "seamen" protected by the statute. The district court denied Players' and Triangle's motions for summary judgment and certified this issue for interlocutory appeal under 28 U.S.C. § 1292(b).

II

The Jones Act creates a federal negligence claim for any "seaman" injured in the course of employment. 46 U.S.C. app. § 688(a). Congress enacted the Jones Act to provide seamen with heightened legal protection because of their exposure to "perils of the sea." *Chandris, Inc. v. Latsis,* 515 U.S. 347, 368 (1995). Oddly enough, the term "seaman" is not defined in the statute; instead, it has been up to the courts to define that central term. The Supreme Court has established two requirements for seaman status: (1) the employee's duties must contribute to the function of the vessel or to the accomplishment of its mission; and (2) the employee must have a "substantial employment-related connection to a vessel *in navigation.*" *Id.* at 373 (emphasis in original); *McDermott Int'l, Inc. v. Wilander,* 498 U.S. 337, 354-55 (1991). As the Supreme Court noted in *Chandris*:

> The fundamental purpose of this substantial connection requirement is to give full effect to the remedial scheme created by Congress and to separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea.

515 U.S. at 369.

The only question before us today is whether an indefinitely moored vessel that has the ready capability of cruising, but that is not used or intended to be used for the purpose of moving or transporting, qualifies as a vessel in navigation. To be precise, it is clear that *Players II* is a vessel; what is contested is whether that vessel is "in

navigation." We are aware that the Supreme Court has granted *certiorari* in *Stewart v. Dutra Construction Co.*, 2004 WL 323176 (U.S. Feb. 23, 2004), which presents the question whether a special-purpose dredge is a Jones Act "vessel." See Pet. for Writ. of Cert., 2003 WL 22926387 (U.S. Dec.3, 2003) (No. 03-814). That question, however, is distinct from the question whether a conventional seafaring craft is "in navigation," as opposed to "out of navigation" or "withdrawn from navigation." *Chandris,* 515 U.S. at 373-74. Because the latter question is the one presented in this case, we see no need to postpone our decision for the resolution of *Stewart.* The navigation issue, the Court held in *Chandris,* is normally one of fact reserved for the jury. *Id.* at 373. As is generally true, however, it is appropriate to remove that issue from the jury if there is no genuine issue of material fact and the law will reasonably support only one conclusion. *Id.*

The district court concluded that *Players II*'s indefinite mooring did not compel the finding that it was not in navigation. Giving little weight to *Players II*'s purpose or actual use, the district court focused instead on the fact that *Players II* was ready and able to cruise at 15-20 minutes' notice. It found this case to be distinguishable from *Pavone v. Mississippi Amusement Corporation,* 52 F.3d 560 (5th Cir. 1995) (analyzing same issue for floating dockside casino not ready and able to cruise, and holding that the vessel was not in navigation), and *Chase v. Louisiana Riverboat Gaming Partnership,* 709 So. 2d 904 (La. App. 1998) (same), because *Players II* was ready and able to cruise. Citing language in *Johnson v. John F. Beasley Construction Company,* 742 F.2d 1054 (7th Cir. 1984), the district court also found support for *Players II*' s "in navigation" status because the vessel was literally

engaged as an instrument of commerce as it floated on the Ohio River, obviously a navigable body of water. *Id.* at 1063. Finally, the district court noted that it was only by virtue of its status as a vessel that *Players II* could operate as a gambling casino. See 230 ILL. COMP. STAT. 10/3-10/4.

While we appreciate the district court's care in considering this question, in the end we are persuaded that *Chandris* requires a more pragmatic approach than the one the court used. As we recognized in *Johnson,* in order for a vessel to satisfy the navigation requirement, the purpose of the vessel "must to some reasonable degree be the transportation of passengers, cargo, or equipment from place to place across navigable waters." *Johnson,* 742 F.2d at 1063 (internal citations and quotations omitted). Moreover, the analysis in *Pavone* and *Chase* did not hinge upon whether the vessel was ready and able to cruise, but looked to the vessel's purpose and actual use (whether it was used to move or transport anything). *Pavone,* 52 F.3d at 570; *Chase,* 709 So. 2d at 910. Finally, whether a ship is a vessel for state law gambling purposes, while perhaps one factor to take into account, does not govern the question whether it is a vessel in navigation for purposes of the Jones Act.

Unlike the vessels in navigation that have been the subject of decisions of this court and the Supreme Court, the purpose of *Players II* was not to move or transport cargo or people, but merely to provide a legal venue under Illinois law for gambling. Recognizing that indefinitely moored dockside casinos are not the kind of vessels that the Jones Act addresses is consistent with the statute's purpose of enhancing legal protections for seamen "regularly" exposed to the "perils of the sea." See *Chandris,* 515 U.S. at 369. We hinted at this conclusion in our earlier

decision in *Weaver v. Hollywood Casino-Aurora, Inc.*, where we remarked that "[i]f the casino were indefinitely moored (as the record suggests it now is), its status as a vessel in navigation would be doubtful." 255 F.3d 379, 387 (7th Cir. 2001). Today we hold that an indefinitely moored dockside casino with no transportation function or purpose is not a vessel "in navigation." See *Martin v. Boyd Gaming Corp.*, 252 F.Supp.2d 321, 323 (E.D. La. 2003); *Grobe v. Hollywood Casino-Aurora, Inc.*, 759 N.E.2d 154, 159-60 (Ill. App. Ct. 2001); see also *Johnson*, 742 F.2d at 1063 ("If the waterborne structure serves no transportation function, of course, it can have no group performing navigational functions, and hence no maritime 'crew.'"); *Tonnesen v. Yonkers Contracting Co., Inc.*, 82 F.3d 30, 36 (2d Cir. 1996) (ignoring original purpose for which the floating structure was constructed and focusing on whether the floating structure was primarily used for transportation purposes during a reasonable period of time immediately preceding the accident). In applying this test, courts will need to examine, among other factors, the current use of the vessel and the question "whether the owner intends to move the structure on a regular basis and the length of time the structure has remained stationary." *Grobe*, 759 N.E.2d at 159.

In this case, the undisputed facts doom the plaintiffs' claims. *Players II* was an indefinitely moored dockside casino at the time of the alleged injuries and was never moved except to be tested. As a matter of law, we conclude that it was not "in navigation" for purposes of the Jones Act, and thus that these plaintiffs were not within the class protected by that statute.

III

The order of the district court denying summary judgment to Players and Triangle is REVERSED, and the case is REMANDED for entry of judgment in their favor.

A true Copy:

Teste:

Clerk of the United States
Court of Appeals for the
Seventh Circuit

APPENDIX B

United States Court of Appeals ts
For the Seventh Circuit
Chicago, Illinois 60604

October 10, 2002

Before

Hon. DANIEL A. MANION, *Circuit Judge*

Hon. DIANE P. WOOD, *Circuit Judge*

Hon. ANN CLAIRE WILLIAMS, *Circuit Judge*

SOUTHERN ILLINOIS RIVERBOAT CASINO CRUISES, INCORPORATED, doing business as PLAYERS RIVERBOAT CASINO, Petitioner, No. 02-8020 v. JOHN HOWARD, ROY FORD, JUDY GRIMES, et al., Respondents.	Petition for Permission to Appeal Pursuant to 28 U.S.C. 1292(b) Southern District of Illinois. G. Patrick Murphy, Chief Judge.
TRIANGLE ENTERPRISES, INCORPORATED, doing business as, TRIANGLE INSULATOIN AND SHEET METAL COMPANY, Petitioner, No. 02-8021 v. JOHN HOWARD, ROY FORD, JUDY GRIMES, et al., Respondents.	Petition for Permission to Appeal Pursuant to 28 U.S.C. 1292(b) Northern District of Indiana, South Bend Division. G. Patrick Murphy, Chief Judge.

The following are before the court:

1. **PETITION FOR PERMISSION TO APPEAL**, filed on August 29, 2002 by counsel for the petitioner in 02-8020.

2. **PETITION FOR PERMISSION TO APPEAL,** filed on August 29, 2002, by counsel for Triangle Enterprises in 02-8021.

3. **ANSWER OF PLAINTIFFS/APPELLEES JOHN HOWARD, ET AL. TO THIRD-PARTY DEFENDANT/APPELLANT TRIANGLE ENTERPRISES, INC. d/b/a TRIANGLE INSULATION AND SHEET METAL COMPANY PETITION FOR PERMISSION TO APPEAL,** filed on September 9, 2002, by counsel for the appellees in 02-8020.

IT IS ORDERED that the petitions are **GRANTED.** Petitioners shall pay the required appellate fees to the clerk of the district court within 10 days of the entry of this order pursuant to Federal Rule of Appellate Procedure (5)(d)(1). Once the district court notifies this court that the fees have been paid, the appeal will be entered on this court's general docket.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

JOHN HOWARD, ROY FORD,)
JUDY GRIMES, BONNIE)
SHELTON, WILMA LOTT,)
JOAN MISCH, VIRGINIA)
MADDEN, PATRICIA)
LEDSINGER, VALERIE)
CARROLL, SHIRLEY)
JOHNSON, GRACE)
ALEXANDER, HOWARD MEZO,)
JERRIE BELCHER, CECELIA)
COOK, ANITA CLAYTON,)
TROY DAVIS, DEBRA)
EASTWOOD, JOHN GREGG,)
THOMAS GRIMES, DANA)
HOCKER, BRECIA HUIE,)
KATHY LAY, KENNETH)
LITCHFORD, ROBIN LITTLE,)
GEORGE MABREY, J.)
RICHARD MATHENY, KEITH)
PLUMLEE, KITTY POLOVINA,)
ZENON RODRIGUEZ, JULIA)
SALYER, PAMULA SHINN,)
PAMELA TAYLOR, BELINDA)
THOMAS, MICHAEL THOMAS,)
NANCY WILLIAMS, LORI ANN)
WURTH, SUSAN WEICHINGER,)
LAURA GRINLINTON, HENRY)
WHITE, BILLY SHELBY,)
KATHY ANN CRAIG, SHERYL)
STATON, MONA ELLIS,)
SHAWN HARGAN, JOHN)
FUGATE, ROBERT SPAIN,)
and JEANE FINDLEY,)

Plaintiffs,	) **CIVIL NO.**
	) **00-4321-GPM**
vs.	)
SOUTHERN ILLINOIS RIVERBOAT/CASINO CRUISES, INC., d/b/a PLAYERS RIVERBOAT CASINO, and HARRAH'S ILLINOIS CORPORATION,	) (Filed Aug. 19, 2002)
Defendants/Third-Party Plaintiffs,	)
vs.	)
TRIANGLE INSULATION AND SHEET METAL COMPANY,	)
Third-Party Defendant.	)

MEMORANDUM AND ORDER

MURPHY, Chief District Judge:

This matter came before the Court on July 29, 2002, for a hearing on motions for summary judgment filed by Defendant Southern Illinois Riverboat/Casino Cruises, Inc., d/b/a Players Riverboat Casino, and Third-Party Defendant Triangle Insulation and Sheet Metal Company (Docs. 61, 68). For the reasons set forth below, the motions are denied. Because the motions involve a controlling question of law as to which there is substantial ground for difference of opinion and because an immediate appeal from this Order may materially advance the ultimate termination of this litigation, the Court certifies the issue for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

BACKGROUND

This action involves a riverboat casino on the Ohio River near Metropolis, Illinois. The action is brought by 47 individual plaintiffs for injuries they allegedly sustained when they were exposed to chemicals while aboard the M/V Players II on July 28 and 29, 2000. All but one of the plaintiffs, Howard Mezo, claims to be a Jones Act seaman. The Court's jurisdiction is premised upon 28 U.S.C. §§ 1331 and 1333.

Defendant Players owns the M/V Players II and operated it as a casino until September 11, 2001.[1] After June 26, 1999, when a change in Illinois law allowed gaming on dockside casinos, the M/V Players II no longer cruised on the Ohio River. According to an affidavit by Jeff Pfeiffer, Players's [sic] Vice President of Operations and Marketing, the owners of the vessel had no intention to resume cruising after that date.

It is undisputed that at the time of Plaintiffs' alleged injuries, the casino was not transporting passengers. It was connected to land-based utilities, such as electricity, telephone, water, and sewer. It was licensed and classified as a passenger vessel with the United States Coast Guard and was equipped with fire fighting and safety equipment. It employed a captain and crew qualified to move the

---

[1] Defendant/Third-Party Plaintiff Harrah's Illinois Corporation was dismissed without prejudice on April 26, 2002. (*See* Doc. 49). After this suit was commenced, Defendant Players filed a limitation of liability action (*see* Cause No. 01-4040-GPM), but it was dismissed pursuant to Defendant's motion for voluntary dismissal on September 26, 2001, with prejudice to refiling a limitation action but without prejudice to defending the claims in this action.

casino if necessary, and it occasionally left its moorings when required by the United States Coast Guard to perform propulsion testing (which was performed without passengers aboard the vessel). The vessel was brought to its location in Metropolis from Lake Charles, Louisiana, under its own power, and, when it was replaced by another vessel in September 2001, it moved to Texas under its own power.

The M/V Players II was a Coast Guard inspected vessel which was required to carry the following documentation: Certificate of Inspection, Certificate of Documentation, Certificate of Financial Responsibility, Ship/Aircraft Radio Station License, Tonnage Certificate, and a Stability Letter. According to the September 28, 2001, Certificate of Inspection, the M/V Players II was required to have a minimum crew of a master, chief engineer, nine deckhands, and four watchmen. The Coast Guard also required that the vessel have two rescue boats, eight inflatable rafts, 1,904 life preservers, six ring buoys, and fire fighting equipment.

In order to cruise, the crew simply had to disconnect the vessel from the dock. According to Players's [sic] Director of Facilities, Jeff Carpenter, in an emergency situation the vessel could be disconnected from the dock in 15 to 20 minutes. (*See* Doc. 70, Exhibit 1 – Carpenter Depo, p. 31).

ANALYSIS

The Jones Act, 46 U.S.C. § 688, was passed in 1920 to provide a cause of action in negligence for "any seaman" injured "in the course of his employment." Unfortunately, the Jones Act does not define seaman, and the definition

has evolved through case law in the years since its passage.

In *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337 (1991), the United States Supreme Court discussed the history behind the Jones Act and its companion for land-based workers, the Longshore Harbor Workers Compensation Act, 33 U.S.C. §§ 901-950. In *Wilander*, the Supreme Court rejected the rule developed by some courts that a seaman must aid in navigation of the vessel in order to qualify as a seaman under the Jones Act. The Supreme Court "jettison[ed] the aid in navigation language," *Wilander*, 498 U.S. at 353, and found that the better rule is to define a seaman under the Jones Act "solely in terms of the employee's connection to a vessel in navigation." *Id.* at 354. The Court noted that "[a]ll who work at sea in the service of a ship face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed." *Id.* Thus, the key inquiry is "employment-related connection to a vessel in navigation . . . a necessary element of the connection is that a seaman perform the work of a vessel." *Id.* at 355.

The *Wilander* Court approved of the test for seaman status which was first formulated by the Fifth Circuit in *Offshore Company v. Robison*, 266 F.2d 769 (1959). *See Wilander*, 498 U.S. at 354-355. Under the test in *Robison*, "there is an evidentiary basis for a Jones Act case to go to the jury:

> (1) if there is evidence that the injured workman was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel; and (2) if the capacity in

> which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips."

Robison, 266 F.2d at 779.

Four years after the *Wilander* decision, in another attempt to clarify the seaman status test, the Supreme Court held that in order to have an employment-related connection to a vessel in navigation, "[t]he worker's duties must contribute to the function of the vessel or to the accomplishment of its mission, and the worker must have a connection to a vessel in navigation (or an identifiable group of vessels) that is substantial in terms of both its duration and its nature." *Chandris, Inc. v. Latsis*, 515 U.S. 347, 376 (1995). The Court noted that the Jones Act was enacted "to protect sea-based maritime workers, who owe their allegiance to a vessel, and not land-based employees who do not." *Id.* at 376.

The fact that a vessel is moored at the time of a plaintiff's injury does not remove the action from the realm of the Jones Act. The *Chandris* Court noted that "it is generally accepted that 'a vessel does not cease to be a vessel when she is not voyaging, but is at anchor, berthed, or at dockside.'" *Chandris*, 515 U.S. at 373 (*quoting DiGiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119, 1121 (1st Cir.) (en banc), *cert. denied*, 506 U.S. 827 (1992)). At some point, major renovations to a vessel in drydock can remove a vessel from being considered in navigation, but the general rule "is that vessels undergoing repairs or spending a relatively short period of time in drydock are still

considered to be 'in navigation.'" *Chandris*, 515 U.S. at 374.

The question here is whether the M/V Players II qualifies as a vessel in navigation because of its moored status as a gambling boat. According to Players, it does not because its purpose is not to any reasonable degree the transportation of passengers, cargo, or equipment from place to place across navigable waters. Players relies on the recent decision from the Illinois Appellate Court for the Second District in *Grobe v. Hollywood Casino*, 759 N.E.2d 154 (Ill. App. Ct. 2001). In *Grobe*, the Second District noted that when determining vessel status, courts consider the following characteristics: "(1) the presence of navigation aids; (2) the presence of lifeboats and other lifesaving equipment; (3) the shape of the bow; (4) the presence of bilge pumps; (5) the presence of crew quarters; and (6) Coast Guard registration." *Grobe*, 759 N.E.2d at 159 (*citing Gremillion v. Gulf Coast Catering Co.*, 904 F.2d 290, 293 (5th Cir. 1990)). The Court noted that to be a vessel in navigation, the vessel's purpose "must be, to some reasonable degree, the transportation of passengers, cargo, or equipment across navigable waters." *Grobe*, 759 N.E.2d at 159 (*citing Johnson v. John F. Beasley Constr. Co.*, 742 F.2d 1054, 1063 (7th Cir. 1984)). It is also relevant "whether the owner intends to move the structure on a regular basis and the length of time the structure has remained stationary." *Grobe*, 759 N.E.2d at 159 (*citing Gremillion*, 904 F.2d at 293).

In *Grobe*, the Second District noted that although it was a matter of first impression for an Illinois court, other jurisdictions have found that indefinitely moored floating casinos are not vessels in navigation for purposes of the Jones Act. *Grobe*, 759 N.E.2d at 159-160 (*citing Pavone v.*

Mississippi Riverboat Amusement Corp., 52 F.3d 560 (5th Cir. 1995); *Chase v. Louisiana Riverboat Gaming Partnership*, 709 So.2d 904 (La. App. 1998)). The facts in *Grobe* were similar to the facts here, *i.e.*, the vessels were connected to land-based utilities, were equipped with fire fighting and safety equipment, and they had internal diesel engines for propulsion. The casinos maintained a captain and crew but, although capable of cruising, never left their moorings after Illinois law changed on June 26, 1999. As Plaintiffs point out, however, the casinos in *Grobe* were confined to a portion of the Fox River between the Illinois Avenue and New York Avenue bridges, and neither casino could have physically passed beneath either bridge.

The Court is mindful of the standard for summary judgment under Rule 56. Under the well-settled standard, summary judgment is proper "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Cox v. Acme Health Servs., Inc., 55 F.3d 1304, 1308 (7th Cir. 1995). A genuine issue of material fact exists for trial when, in viewing the record and all reasonable inferences drawn from it in a light most favorable to the nonmovant, a reasonable jury could return a verdict for the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The movant bears the burden of establishing that there exists no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

If the movant meets this burden, the nonmovant must set forth specific facts that demonstrate the existence of a genuine issue for trial. FED. R. CIV. P. 56(e); *Celotex*, 477

U.S. at 324. Rule 56(c) mandates the entry of summary judgment against the party "who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and in which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. As the Supreme Court stated in *Anderson*, "there must be evidence on which the jury could reasonably find for the [nonmovant]." *Anderson*, 477 U.S. at 250. Weighing evidence, determining credibility, and drawing reasonable inferences are jury functions, not those of a judge deciding a motion for summary judgment. *Anderson*, 477 U.S. at 255.

The Supreme Court has said repeatedly that seaman status under the Jones Act is a question of fact for a jury. *See Wilander*, 498 U.S. at 355. Although better characterized as a mixed question of law and fact, "[i]f reasonable persons, applying the proper legal standard, could differ as to whether the employee was a 'member of a crew,' it is a question for the jury." *Id.* at 356 (*quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 250-251).

The Court notes that the Seventh Circuit has stated in *dicta* that if a casino is indefinitely moored, "its status as a vessel in navigation would be doubtful." *Weaver v. Hollywood Casino-Aurora, Inc.*, 255 F.3d 379, 387-388 (7th Cir. 2001) (*citing Pavone*, 52 F.3d at 570). The Seventh Circuit noted, however, that there is difference of opinion on "when floating casinos which travel on a river are Jones Act vessels." *Weaver*, 255 F.3d at 389. The *Weaver* Court remanded the case for the district court to determine whether the plaintiff was employed on a boat "with the requisite relationship to navigable waters for purposes of the Jones Act." *Id.* at 387.

In *Weaver*, a slot machine attendant was injured on board the City Lights I, a riverboat casino owned by Hollywood Casino-Aurora, Inc. In that case, the parties had stipulated that the Fox River on which the vessel was located was navigable generally, but the record reflected that the small portion of the river where the accident occurred was not navigable because there was a dam on one side and a bridge on the other. The Seventh Circuit raised the issue of subject matter jurisdiction *sua sponte* and remanded the case with directions for the district court to examine its subject matter jurisdiction.

The instant case is distinguishable from *Weaver*. First, there is no indication that the M/V Players II could not navigate if and when the owners decided that it should. In fact, it arrived at its Metropolis location under its own power and it left in the same way. The vessel could have cruised at any time, even though Players states that its intention was not to do so. In this manner, the instant case is also different from the cases upon which Plaintiffs rely, such as *Grobe*, *Pavone*, and *Chase*. For instance, unlike the M/V Players II, the vessel in *Pavone*, the Biloxi Belle, had no engine, no captain, no navigational aids, no crew quarters, and no lifesaving equipment. *Pavone*, 52 F.3d at 564. It was fitted with only a decorative pilot house containing no operating parts. *Id.* It did not have a steering mechanism but was decorated with an antique wheel. *Id.* The ring buoys on it were for purely visual effects and not intended for lifesaving. *Id.*

Similarly, the vessel in *Chase*, the Lady of the Isle, was permanently moored in a containment pond adjacent to the Red River. *See Chase*, 709 So.2d at 910. After its arrival in Shreveport, Louisiana, it never left the containment pond and did not operate on navigable waters at all;

it was even exempt from the Louisiana Riverboat Economic Development and Gaming Control Act's cruising requirements. *Id.* Unlike the Players II, the Lady of the Isle needed permission from the United States Corps of Engineers to leave its mooring. *Id.*

The Seventh Circuit has previously found that an "injured employee does not cease becoming a member of a crew if the vessel is docked or anchored at the moment of injury." *Johnson*, 742 F.2d at 1065, *overruled on other grounds, McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337 (1991). Specifically, by quoting a Third Circuit decision, the Seventh Circuit noted,

> As properly construed, the "in navigation" requirement is used in its broad sense, and is not confined strictly to the actual navigating or movement of the vessel, but instead means that the vessel is engaged as an instrument of commerce or transportation on navigable waters. [Citation omitted]. Indeed, so long as the vessel is upon navigable waters, an injured Jones Act seaman may recover for injuries suffered while on the wharf. [Citation Omitted].

Johnson, 742 F.2d at 1063-64, (*quoting Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31, 37 (3d Cir. 1975)). Here, there is no doubt that the M/V Players II was engaged as an instrument of commerce on navigable waters. It is only by virtue of its status as a vessel that the M/V Players II can operate as a gambling casino. *See* 230 ILCS 10/3-10/4. Thus, the Court does not agree that its moored status removed it from Jones Act coverage at the time of injury. The M/V Players II was not in drydock undergoing major overhauls or renovations. *See Chandris*, 515 U.S. at 374. It remained ready for another voyage; it

remained as an instrument of commerce while dockside gaming took place on navigable waters.

Finally, although it is rare that this Court finds an action suited for an interlocutory appeal, the Court believes that this issue "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from [this order] may materially advance the ultimate termination of the litigation." *See* 28 U.S.C. § 1292(b). This issue presents a controlling question of law which has not yet been decided in the Seventh Circuit. It is highly contestable, and resolution of the issue will expedite the resolution of the litigation. *See Boim v. Quranic Literacy Inst. and Holy Land Found. for Relief and Dev.*, 291 F.3d 1000, 1007 (7th Cir. 2002). This is particularly true in light of the fact there are 47 plaintiffs in this case and a trial will be held on each claim. A determination as to whether those plaintiffs who were employed aboard the M/V Players II at the time of injury were Jones Act seamen as pivotal to the action's future. Accordingly, this Court certifies the issue for appeal.

CONCLUSION

For the foregoing reasons, Defendants' motions for summary judgment (Docs. 61, 68) are **DENIED**, and the Court **CERTIFIES** the following issue for interlocutory appeal to the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. § 1292(b):

> **Was the M/V Players II a vessel in navigation on July 28-29, 2000, such that the plaintiffs who were employed on board the M/V Players II were Jones Act seamen?**

This action is **STAYED** until further Order of this Court. All previously imposed deadlines and settings are **VACATED.**

IT IS SO ORDERED.

DATED this 19th day of August, 2002.

/s/ G. Patrick Murphy
G. PATRICK MURPHY
Chief United States
District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 17, 2004

Before

Hon. JOHN L. COFFEY, *Circuit Judge*

Hon. MICHAEL S. KANNE, *Circuit Judge*

Hon. DIANE P. WOOD, *Circuit Judge*

Nos. 02-3818 & 02-3819

JOHN HOWARD, et al.,

Plaintiffs-Appellees,

v.

SOUTHERN ILLINOIS RIVERBOAT CASINO CRUISES, INC., d/b/a PLAYERS ISLAND CASINO,

Defendant, Third-Party Plaintiff-Appellant,

v.

TRIANGLE ENTERPRISES, INC., d/b/a TRIANGLE INSULATION AND SHEET METAL COMPANY,

Third-Party Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Illinois.

Nos. 00 C 4321 & 01 C 4299

G. Patrick Murphy, *Chief Judge.*

ORDER

On consideration of the Petition for Rehearing and Suggestion for Rehearing En Banc filed by counsel for the Plaintiffs-Appellees on May 3, 2004, all members of the original panel voted to **DENY** rehearing, and no judge in regular active service requested a vote on rehearing en banc.

Accordingly, IT IS ORDERED that the Petition for Rehearing and Suggestion for Rehearing En Banc be, and the same is hereby, **DENIED**.

APPENDIX E

46 U.S.C. app. § 688. Recovery for injury to or death of seaman

(a) Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying *or* extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185; June 5, 1920, c. 250, § 33, 41 Stat. 1007.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
BENTON DIVISION

JOHN HOWARD, ROY FORD, JUDY GRIMES, BONNIE SHELTON, WILMA LOTT, JOAN MISCH, VIRGINIA MADDEN, PATRICIA LEDSINGER, VALERIE CARROLL, SHIRLEY JOHNSON, GRACE ALEXANDER, JERRIE BELCHER, CECELIA COOK, ANITA CLAYTON, TROY DAVIS, DEBRA EASTWOOD, JOHN GREGG, THOMAS GRIMES, DANA HOCKER, BRECIA HUIE, KATHY LAY, KENNETH LITCHFORD, ROBIN LITTLE, GEORGE MABREY, J. RICHARD MATHENY, KEITH PLUMLEE, KITTY POLOVINA, ZENON RODRIGUEZ, JULIA SALYER, PAMULA SHINN, PAMELA TAYLOR, BELINDA THOMAS, MICHAEL THOMAS, NANCY WILLIAMS, LORI WURTH,

Plaintiffs,

vs

SOUTHERN ILLINOIS RIVERBOAT/CASINO CRUISES, INC., d/b/a Players Riverboat Casino; and HARRAH'S

No: 00-4321 GPM

(Filed Jun. 7, 2002)

ILLINOIS CORPORATION, a Nevada Corporation,
Defendants/Third Party Plaintiffs,
vs
TRIANGLE INSULATION AND SHEET METAL COMPANY

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

COME NOW the plaintiffs, John Howard, et al., by and through their undersigned counsel, and hereby respond to Defendant's Motion for Summary Judgment as follows:

Despite initiating this matter by filing a Limitation of Liability proceeding and despite paying maintenance and cure to several plaintiffs in this action, defendants now move for summary judgment claiming that the M/V Players II is not a vessel in navigation. This motion is without merit. There is no real dispute that the M/V Players II is a "vessel". There is no dispute that the M/V Players II was an instrument of commerce on water at all relevant times in that gaming activity took place even while the vessel was moored. (Affidavit of John Howard attached as Exhibit 8). There is no dispute that plaintiffs are members of the crew of the vessel and contribute to its mission as a gaming vessel. At the time of this incident and continuing until it was replaced, the M/V Players II maintained a full-time marine crew, remained a Coast Guard licensed passenger vessel that could leave the dock and cruise on the open river within 15-20 minutes and in

2001, actually did cruise to a dock outside Houston, Texas where it is now being held for sale. For these reasons and others which will be discussed after a brief review of the facts, Defendants' motion must fail.

FACTS

At all relevant times, the M/V Players II was a river-boat casino located on the Ohio River in Maasac County, Illinois. (Affidavit of Jeff Pfeiffer, paragraph 2). Defendant does not contend that the Ohio River is not a navigable waterway of the United States. To begin operations in Illinois, the M/V Players II was brought from Lake Charles, Louisiana under its own power with two assist boats (Deposition of George Carpenter pp 5-6, attached hereto as Exhibit 1). In September of 2001, the M/V Players II was replaced by the M/V Harrah's Northstar and moved to Texas under its own power. (Defendant's Responses to Request to Admit paragraph 9 & 10).

The M/V Players II was a U.S. Coast Guard inspected vessel which employed a captain and crew qualified to navigate the vessel. (Request to Admit Par 2, 11 and 12). As a Coast Guard inspected vessel, the M/V Players II was required to carry the following documentation: Certificate of Inspection, Certificate of Documentation, Certificate of Financial Responsibility (water pollution), Ship/Aircraft Radio Station License, Tonnage Certificate, and a stability letter. (Attached hereto as Exhibits 2-7). The U.S. Coast Guard does nothing whatsoever with regard to the gaming function of the vessel. (Carpenter deposition p. 11).

According to the September 28, 2001, Certificate of Inspection, the M/V Players II is required to have a mini-mum crew of a master, chief engineer, nine deckhands and

four watchmen. Additionally, the Coast Guard required that the M/V Players II have two rescue boats, eight inflatable rafts, 1904 life preservers, and six ring buoys, along with particular fire fighting equipment.

The M/V Players II left the dock during Coast Guard inspections. (Carpenter Deposition p. 24). The vessel was required to do weekly man overboard, fire and emergency, abandon ship and allision or collision drills. (*Id.* p. 25); the vessel was also required to do a monthly emergency generator test. (*Id.* p 25).

To cruise, the crew simply had to disconnect the vessel from the dock, which could be accomplished in as little as 15-20 minutes. *Id.* p. 31. In July and August of 2000, there was nothing about the river which prevented the vessel from cruising. (*Id.* p. 32). Further, the vessel's engine and navigational aides were all fully functional in July and August 2000. (*Id.* p.37).

Finally, Defendant has never notified the Coast Guard of an intent to surrender its Certificate of Inspection, nor has the vessel ever applied for permanent mooring status.

BACKGROUND: SEAMAN STATUS

The Jones Act (46 U.S.C. Section 688) provides benefits to the members of the crew of a vessel for injuries resulting from employer negligence. *McDermott International Inc. vs. Wilander,* 498 U.S. 337, 347, 112 L.Ed.2d 866, 111 S. Ct. 807 (1991). In *Wilander,* the Supreme Court approved the seaman status test first formulated by the Fifth Circuit in *Offshore Co. v. Robison,* 266 F.2d 769, 779 (5th Cir. 1959):

"There is an evidentiary basis for a Jones Act case to go to a jury

(1) If there is evidence that the injured workman was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel;

and

(2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance *during its movement or during anchorage for its future trips.*" 266 F.2d at 779 (emphasis added)

Defendant's motion fails to acknowledge the italicized portion of the seaman status test. Defendant's argument is premised on the clearly erroneous assumption that the M/V Players II loses its status as a vessel (and, so the argument goes, plaintiff thereby loses her status as a seaman) during the time the vessel is berthed or moored. An argument remarkably similar to that advanced by defendant was rejected by the Eastern District of Louisiana: "Defendant's argument that plaintiff did not contribute to the vessel's mission because she never went to sea on the yacht ignores *Robison* which includes workers who contribute to the vessel's mission 'during anchorage'. Defendant further attempts to persuade the Court that 'contribute to the mission of the vessel' is just another way of saying the plaintiff must 'aid in the navigation' of the

vessel, and therefore relies heavily on pre-Robison Fifth Circuit authority and Third and Ninth Circuit authority. This argument has no merit." *Lunsford v. The Fireman's Fund Insurance Co.*, 635 F.Supp. 72, 74 (E.D.La. 1986)[1]

Defendants make no challenge in their motion to Plaintiffs' assignment or contribution to the vessel. Accordingly, those issues are not addressed herein as Plaintiffs' Complaint alleges that plaintiffs were "members of the crew" of the vessel.

I. A Vessel Remains "In Navigation" While Berthed or Even In Dry Dock

Congress has defined a vessel to include "every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. section 3. The Supreme Court has held that even "[a] barge is a vessel within the meaning of the [Jones] Act even when it has no motive power of its own, since it is a means of transportation on water." *Norton v. Warner Co.*, 321 U.S. 565, 571, 64 S.Ct. 747 (1944). Because the M/V Players II has its own motive power and cruises, even if only for Coast Guard Inspections, the gambling boat is unquestionably a vessel.

It is well established that a vessel is "in navigation" while moored in navigable waters. *Senko v. LaCrosse Dredging Co.*, 352 U.S. 370, 373, 1 L.Ed.2d 404, 77 S.Ct

[1] *Lunsford* was decided before the Supreme Court's decision in *Wilander*, supra. *Wilander* provides additional support for the *Lunsford* court's analysis because *Wilander* definitively abolished the "aid to navigation" requirement.

415 (1957). The Supreme Court there rejected an argument congruent with that advanced by defendant in the instant case:

> "Whether petitioner would be a member of the dredge's crew while taking soundings during a trip is certainly a jury question. If he were a member during travel, he would not necessarily lack that status during anchorage. Even a transoceanic liner may be confined to berth for lengthy periods, and while there the ship is kept in repair by its 'crew'. *There can be no doubt that a member of its crew would be covered by the Jones Act during this period, even though the ship was never in transit during his employment*". 352 U.S. 370, 373 (emphasis added).

Defendant's reliance on *Chandris, Inc. v. Latsis,* 515 U.S. 347, 132 L.Ed. 2d 314, 115 S.Ct. 2172 (1995) is misplaced. Defendant apparently reads *Chandris* to hold that Latsis was not a seaman. In fact, the Court reversed that finding. The court actually held that the jury should, have been instructed to consider the time *the vessel was in dry-dock* (and therefore completely out of the water) as well as when it was cruising to determine whether plaintiff was a seaman. The jury had found that the plaintiff was not a seaman based on an instruction that told them "that in determining whether Mr. Latsis performed a substantial part of his work on the vessel, you may consider the period of time the Galileo was in dry-dock in Germany, because during that time period she was out of navigation." This is exactly the point on which the Court reversed.

The Chandris holding is a tacit approval of the Seventh Circuit's vessel analysis in *Johnson v. John F. Beasley*

Construction Co., 742 F.2d 1054, 1063-1064 (7th Cir. 1984), overruled on other grounds, *McDermott International, Inc. v. Wilander*, 498 U.S. 337, *supra*.[2] The Seventh Circuit there held that "the injured employee does not cease becoming a member of a crew if the vessel is docked or anchored at the moment of injury. '*As properly construed, the "in navigation" requirement is used in its broad sense, and is not confined strictly to the actual navigating or movement of the vessel, but instead means that the vessel is engaged as an instrument of commerce or transportation on water.* [Citation omitted.] Indeed, so long as the vessel is upon navigable waters, an injured Jones Act seaman may recover for injuries suffered while on the wharf." *Johnson*, 742 F.2d 1054, 1063-1064 (emphasis added). The Seventh Circuit's test for vessel status is disjunctive: either an instrument of commerce *or* of transportation on water. Defendants' motion completely ignores the Seventh Circuit's specific alternative test for vessel status as "an instrument of commerce" on water.

The Supreme Court in *Chandris* agreed with the Court of Appeals that the district court had erred in concluding that the vessel was not "in navigation" while it was in dry-dock. "Under our precedent and the law prevailing in the Circuits, it is generally accepted that 'a vessel does not cease to be a vessel when she is not voyaging, but is at anchor, berthed, or at dockside." 515 U.S. at 376, *quoting Digiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119, 1121 (1st Cir.) (en banc), *cert. denied*, 506 U.S. 827, 121 L.Ed. 2d 50, 113 S.Ct. 87 (1992). The Court further

---

[2] *Wilander* rejected the *Beasley* court's adoption of the aid in navigation requirement to seaman status.

noted that "likewise a vessel is in navigation, although moored to dock, if it remains in readiness for another voyage." 515 U.S. at 374, quoting 2 M. Norris, Law of Seamen §30.13, p.364. It is only when a vessel is "transformed through 'major' overhauls or renovations" that it ceases to be "in navigation." 515 U.S. at 374. The Court noted that at a six month period in which a vessel is out of service was relatively minor by maritime standards. *Id.*; *cf. McCarthy v. The Bark Peking*, 716 F.2d 130, 136 (2d Cir. 1983) (museum ship permanently moored for over 50 years with rudder welded in place was still a vessel because it rested on navigable waters and could return to sea, even if only in tow). This analysis is even more applicable when the vessel in question remains in commerce (i.e., making money from gaming) while the vessel is docked.

Thus, the affidavit of Jeff Pfeiffer, on which defendant principally relies for its factual support, completely misses the mark. George Carpenter has testified that, to cruise, the crew simply has to disconnect the riverboat from the dock, which takes, at most 15-20 minutes. (Carpenter deposition at p 31). The fact that in order for the casino to leave the dock, it must disconnect from land based utilities (Pfeiffer Affidavit, Par 7) pales in comparison to the six months specifically approved by the Supreme Court in *Chandris* and the fifty years in *McCarthy*. See also *Stewart v. Magnum Transcontinental Corp.*, 81 F.Supp.2d 753 (S.D. Tex. 2000) (vessel undergoing repairs at dock for ten months remains a vessel): see also *Thompson v. Kerr-McGee Oil & Gas Corp.*, 1999 U.S. Dist. Lexis 2065 (E.D.La. 1999) (plaintiff assigned to vessel for one seven day hitch during which vessel was always anchored

qualified as seaman). Under *Chandris,* the M/V Players II remained a vessel during the times it was berthed.

II. *Grobe, Pavone,* and *Chase* Are All Distinguishable From The M/V Players II Unique Situation And, Therefore, The Results Therein Do Not Control Here.

None of the authority cited by Defendant control the facts of this case. In *Grobe,* for example, the record was devoid of any evidence that the riverboat had ever left its moorings, for any reason, after June 1999. That is simply not the case here. Also, *In Grobe,* there was absolutely no evidence that the casino would ever cruise again. The M/V Players II cruised to Texas under its own power in 2001, (Carpenter depo p.34).

Finally, the Grobe casino was confined to a specific portion of the Fox River less than a mile long between two bridges because the riverboat could not pass beneath either bridge. *Grobe,* 259 Ill. Dec. at 676. In this case, on the other hand, George Carpenter, testified that that [sic] except in high water conditions which caused problems with a railroad bridge, the M/V Players II could cruise, and in fact, did cruise, the Ohio River at will. (Carpenter deposition at pp. 37,35&43).

Pavone v. Mississippi Amusement Corp., 52 F.3d 560 (5th Cir. 1995) is not even close. Unlike the M/V Players II, the Biloxi Belle had no engine, no captain, no navigational aids, no lifesaving equipment, no working steering mechanism, and it was not constructed to be, nor has it ever been, used as a seagoing vessel to transport passengers across navigable waters. *Id.* at 564. The Biloxi Belle had a pilot house, ring buoys, and a motorized paddle

wheel, *all for purely visual effects,* and in order to move, *it had to be towed because it could not move about on its own. Id.* Moreover, all the workers on the Belle were employed solely in connection with the casino, operation. *Id.* at 564-65.

Chase v. Louisiana Riverboat Gaming Partnership, 709 So.2d 904 (La.App. 1998) similarly misses wide of the mark. The *Chase* court dealt with a riverboat casino that, unlike the M/V Players II, was indeed permanently moored. The Lady of the Isle sailed from its construction site to a containment pond adjacent to the Red River. *Id.* at 906-07. Unlike the M/V Players II, the riverboat had not left its moorings since it arrived in the pond. *Id.* at 906. Although the casino could be unmoored and moved into the Red River, the process to do so bares no resemblance to the M/V Players II's quick-disconnect policy:

> [First], it would be necessary to disconnect the [Lady of the Isle] from all its land based utility sources and to disconnect its steel cable mooring lines from the cement pilings inside the slip. Second, it would be necessary to obtain a dredging permit from the [U.S.] Army Corps of engineers, as well as permits to allow dumping of 25 tons of rock (and of the accumulated silt and dirt levee constructed by the Red River). Third, diving teams would be required to disconnect steel pins holding the four steel buttresses, which support the steel wall, and to remove the rubber liner inside of the wall. Finally, a crane barge of at least 100 ton capacity would be required to lift the steel wall and the four steel buttresses out of the water. ***Such a procedure would require approximately two to three months and cost between $500,000.00 and $1 million.*** *Id.* at 906 (emphasis added).

Grobe, Pavone, and *Chase* can and should be distinguished on their facts when compared to this case. Unlike the M/V Players II, none of the crafts in those cases looked *and* acted like a vessel. Accordingly, Defendant's Motion should be denied. Moreover, despite these major differences, *Grobe* remains erroneous in its reasoning in light of the Supreme Court decisions discussed above.

III. Defendants' statement of its intent to permanently moor the vessel is contradicted by its actions.

The M/V Players II's self serving statement of its intent to permanently mour [sic] the vessel is contradicted not only by the admissions of Jeff Pfeiffer and George Carpenter as set forth above, but it is also contradicted by the conduct of the defendant throughout this litigation.

First, Players initiated this action by filing a Limitation of Liability proceeding in this court. Consistent with that judicial admission, the M/V Players II paid certain plaintiffs in this matter maintenance and cure, remedies specifically provided only to injured seaman under maritime law. (Affidavit of John Howard attached hereto as Exhibit 8).

Moreover, despite the repeated claims that the vessel is permanently moored, there can be no dispute that at a minimum the M/V Players II left its moorings during the quarterly and annual Coast Guard Inspections. (Carpenter Deposition at p. 24). Additionally, in September 2001, the M/V Players II was replaced by the M/V Harrah's Northstar. (Response to Request for Admission No. 9). At that time, the M/V Players II traveled under its own power with no assistance to a dock in Texas (Carpenter Deposition at p.

34). Further the M/V Players II never relinquished its certificate of inspection, nor has it ever applied for permanent mooring status with the United States Coast Guard. Finally, the M/V Players II floats on the Ohio River, not a man-made lagoon, and remains subject to the common perils associated with river traffic. This conclusion is borne out by the presence of the vessel's life jackets, rescue boats, eight inflatable rafts, and ring buoys as well as the vessel's man-overboard and collision/allision drills, which are only necessary because the persons on board the vessel are exposed to the perils of the sea.

A recent Missouri decision, cited approvingly in *Grobe,* further explains that a casino's self-serving statement of its intent to permanently moor a riverboat is not determinative of whether the riverboat remains a vessel in navigation. *Davis v. Missouri Gaming Company* at 168 174 (Mo. App. W.D. 2001). In *Davis,* the Argosy IV riverboat was placed in a man-made lagoon adjacent to the Missouri River after the riverboat obtained permission to stop cruising. *Id.* at 172. From that point on, there was no evidence that the riverboat had ever left its moorings. *Id.* at 173 n. 5. And the Argosy IV's chief engineer testified that the casino had no plans to ever remove the riverboat from its moorings in the future. *Id.* at 174.

Nevertheless, the court concluded that the casino's intent was contradicted by its actions. First, the casino treated the plaintiff as an injured seaman by paying her from the moment she was injured "maintenance and cure" – one of the remedies under maritime law. *Id.* Second, the casino maintained a full marine crew, its Coast Guard certification, and retained its capability to cruise until two years after the plaintiffs injury. *Id.* It was only then that the casino relinquished its Certificate of Inspection and applied for permanent mooring status from the Coast

Guard. *Id.* at 175. Based on the above, the court reversed summary judgment in favor of the casino. The court held that these facts created an issue of fact as to the casino's intention or belief that the riverboat was permanently moored at the time of the plaintiff's injury. *Id.*

In summary, if a structure looks like a vessel and acts like a vessel, it's a vessel "in navigation" under the Jones Act. The M/V Players II looks like a vessel and acted like a vessel at the time of Plaintiffs' injury.

CONCLUSION

The purpose of the Jones Act is to provide heightened legal protection to seamen injured in the course of employment because seaman are exposed to the "peril of the sea." *Grobe,* 259 Ill.Dec, at 678 (citing G. Gilmore & C. Black, Law of Admiralty Sec. 6-21, at 328-29 (2d. ed. 1975). As set forth above, Plaintiffs were subject to maritime disasters, runaway barges, burning docks, and the rising tides of the Mississippi during their employment with Defendant. In addition, the M/V Players II cruised as required by the Coast Guard and Cruised to Texas when it was replaced. Accordingly, Plaintiffs were seamen on a vessel "in navigation" under the Jones Act. Defendants' Motion should, therefore, be denied.

THE LAKIN LAW FIRM, P.C.

By: /s/ Gerard B. Schneller

Gerard B. Schneller – #06205863
Attorney for Plaintiff
301 Evans Avenue
Wood River, Illinois 62095
Telephone: (618) 254-1127
Facsimile: (618) 254-0193

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the above and foregoing instrument was hand delivered this 6th day of June 2002

Gordon Broom
P.O. Box 510
Two Mark Twain Plaza
103 West Vandalia Street
Suite 300
Edwardsville, IL 62025

Ron Fox
One Memorial Drive
Eighth Floor
St. Louis, MO 63102

/s/ Deborah Ramrez

on the 6th day of June, 2002

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
BENTON DIVISION

JOHN HOWARD, et al. Plaintiffs vs SOUTHERN ILLINOIS RIVERBOAT/CASINO CRUISES, INC., d/b/a Players Riverboat Casino; and HARRAH'S ILLINOIS CORPORATION, a Nevada Corporation, Defendants/Third-Party Plaintiffs, vs. TRIANGLE INSULATION AND SHEET METAL COMPANY, Third-Party Defendants.	)	No: 00-4321 GPM

The 30(b)(6) deposition of *GEORGE A. CARPENTER*, taken by the Plaintiffs pursuant to Notice on Monday, the 20th day of May, 2002, at the hour of 12:00, at the offices of Harrah's Casino, in the City of Metropolis, County of Massac, State of Illinois, before me, Elizabeth Miller, RPR, RMR, CSR (IL), to be used for all purposes allowed under the Federal Rules Of Civil Procedure.

Registered Professional Reporters

WEST KENTUCKY REPORTING SERVICE, INC.

Certified Shorthand Reporters

1324 JEFFERSON STREET
PADUCAH, KY 42001

PHONE: (270) 443-9631
FAX: (270) 443-9561

[2] APPEARANCES

For Plaintiff:
MR. GERARD B. SCHNELLER
of the LAKIN LAW FIRM
301 Evans Avenue
P.O. Box 229
Wood River, IL 62095-0229

For Defendants/
Third-Party
Plaintiffs:
MR. STEPHEN P. NIEMIRA
of the law firm of
FOX GALVIN
One Memorial Drive
Eighth Floor
St. Louis, MO 63102

For Third-Party
Defendants:
MR. GREGG A KINNEY
of the law firm of
BURROUGHS, HEPLER,
BROOM, MacDONALD,
HEBRANK & TRUE
103 West Vandalia Street
Suite 300
Edwardsville, IL 62025-0510

Also Present:
Mr. Jeff Pfeiffer

INDEX

GEORGE A. CARPENTER	Direct	Cross
By Mr. Schneller:	3	
SIGNATURE OF DEPONENT: 45		
ERRATA SHEET: 46		
CERTIFICATE OF REPORTER: 47		

EXHIBITS

Number	Description	Page
Plf. 1	Affidavit of Jeff Pfeiffer	3
Plf. 2	Certificate of Inspection, Certificate of Documentation, Certificate of Financial Responsibility, FCC Radio Station License, Tonnage Certificate, Stability Letter	3

[3] (Plaintiffs' Deposition Exhibits Nos. 1 and 2 marked for identification by the reporter.)

The witness, *GEORGE A. CARPENTER,* after first having been duly sworn, testified as follows:

MR. SCHNELLER: Before we start, for the record, the Burroughs firm has been noticed for the depo for noon. It's 10 after 12:00. We attempted to call their office, got voice mail from secretaries and lawyers alike. So we're going to go ahead and start the depo.

DIRECT EXAMINATION BY MR. SCHNELLER:

Q. Will you state your name, please?

A. George A. Carpenter.

Q. And your home address, sir?

A. 7530 Stacey Lane.

Q. Date of birth?

A. 5-9-51.

Q. And social security number?

A. 400-76-7518.

Q. How are you presently employed?

A. Director of facilities.

Q. At?

A. Harrah's Metropolis Casinos.

[4] Q. Prior to working for Harrah's, where did you work?

A. Waterfront services.

Q. Okay. Is that in Cairo?

A. Cairo.

Q. All right. How long have you worked for Harrah's?

A. Since 1993.

Q. Okay.

A. February.

Q. Did you work for – when this was previously the Players facility, did you work here then?

A. Yes.

Q. During the time that Players operated this facility, what was your job title?

A. Director of marine operations.

Q. The whole time Players was here – or that you were at Players, I should say – were you the director?

A. No. From probably around '95 on, or '94.

Q. Director of marine operations?

A. Yes, sir.

Q. Okay. And prior to that, what was your job title?

A. Captain.

[5] Q. Along with being the director of marine operations when this facility was Players, did you work as a captain as well?

A. Yes.

Q. So you did both things?

A. Yes.

Q. And I guess you would have been what some would call the senior captain?

A. Yes.

Q. All right. Just so we're clear on time frames, when did this become Harrah's?

A. Not exactly sure.

Q. Have you got a rough guesstimate?

A. 1999, 2000.

Q. All right.

A. Late '99.

Q. I'm going to ask you questions about the PLAYERS CASINO II, okay? When did that vessel begin its operation here?

A. 1995, fall.

Q. Do you know where it came from?

A. Lake Charles, Louisiana.

Q. And was it operating as a casino boat there?

A. Yes.

Q. Was it a Players Vessel in Lake Charles?

[6] A. Yes.

Q. How did the vessel get from Lake Charles to here?

A. Under its own power with two assist boats.

Q. All right. What did the assist boats do?

A. Pushed and helped steer.

Q. Why did it need the assist boats?

A. Swift current and time.

Q. When you say time, I guess what you mean is it got up here faster?

A. Yes

Q. All right. And where was the problem with the Swift Current? Was there a particular area?

A. From New Orleans to Metropolis.

Q. All right. Was there a particularly high water period?

A. No. It was average river conditions.

Q. Okay. I guess my question is, what swift current conditions caused there to be assist boats?

A. Well, lack of power on that boat.

Q. All right. And you say all the way to here. Up the Ohio?

A. From – not all the way here. I think we let one go at Cairo and one go around Future City [7] or a little above.

Q. Okay. Can you explain to me what the assist boats do when the vessel is brought from Lake Charles to the Cairo area or metropolis? Are they assisting at all times?

A. Yes. Well, not all the way to Metropolis. Like I say, the last one left at Future City.

Q. How was the vessel crewed on the way up here?

A. With a full marine crew.

Q. Can you describe what that is?

A. One captain – well, actually, two captains, two mates, two chief engineers, two oilers, and a minimum of eight deckhands.

Q. Did you participate in that transfer?

A. Yes.

Q. Were you actually on the boat?

A. Yes.

Q. And I guess you would have been the senior captain?

A. Yes.

Q. All right. I noticed in looking at the boat that it had those fancy fake – what I call fake smokestacks on the top deck.

A. Yes.

Q. Were those in place when the vessel was brought [8] from Lake Charles to metropolis?

A. No.

Q. That was something that was put on once it got here?

A. Yes.

Q. At the time the vessel was brought to Metropolis in 1995 – as your best guess, I think – what sort of certificate or licensure did it have?

A. It was a Coast Guard-inspected vessel.

Q. All right. And I guess because it was in Lake Charles, it hadn't been inspected for quite some time there?

A. Since it was built.

Q. You didn't have to have any sort of temporary inspection or temporary licensure?

A. No.

Q. Once the PLAYERS II was brought here in 1995, was it put directly in service?

A. It was a week or two later after it was here.

Q. I guess there were some things done to the vessel to make it ready to work?

A. We had a Coast Guard inspection, cleaned it up.

Q. Let's go ahead and talk about that now. I've been – today I've received a copy of the [9] certificate of inspection. Okay? How often are Coast Guard inspections – were they done on the PLAYERS II?

A. Quarterly.

Q. Okay. So once every four months?

A. Yes – three months.

Q. Once every three months, I'm sorry. That's why I'm not a doctor. And you had to have one done right before it began working here in the Metropolis area?

A. Yes.

Q. All right. The one that I have here, which has been marked as Exhibit 2, looks to me like it was – well, you can tell us when that inspection was done.

MR. NIEMIRA: Let me just clarify, Gerry. There's more than just the certificate of inspection here. And while the top sheet – you've handed him more than just that, so if you want him to talk about the certificate of inspection as part of this as a group exhibit, I just wanted to clarify that that's what he's talking about.

Q. Right. I'm talking about the top page on group Exhibit 2. When was that inspection done?

[10] A. On this particular one?

Q. Yes.

A. On 4 October.

Q. Of? Can you tell?

A. Five years prior to – or one year prior to this, so it would have been '01.

Q. Okay. So is that – was the PLAYERS II still in service here in metropolis at the time that it was inspected?

A. Yes.

Q. I guess what I was sort of wondering is, is this an inspection done prior to its departure from the metropolis area?

A. This was the annual inspection that's performed every year regardless.

Q. All right. Let me see if I understand. You told me that there's a quarterly inspection, correct?

A. Yes.

Q. And then there's also an annual inspection as well?

A. Well, there's four quarterly inspections, which the final one – or the first one, any way you want to look at it – is an annual inspection.

Q. You lost me.

[11] A. Four inspections.

Q. Yes.

A. First one would be the annual inspection, then the quarterly, quarterly, quarterly, then an annual.

Q. All right. When the Coast Guard does their inspections, do they do anything whatsoever with regard to the gaming function of the vessel?

A. No.

Q. All right. I'm going to go through here, and you tell me what's included in this group Exhibit 2, if you wouldn't mind. Can you just go through here and tell me what's in there?

A. Certificate of inspection.

Q. That's a three-page –

A. Yes.

Q. Okay.

A. Certificate of documentation.

Q. All right. Explain to me what the certificate of documentation is.

A. It's a documented vessel.

Q. All right. Is that something that you got one time, or do you have to do that yearly?

A. You get a sticker that's stamped on the back [12] annually.

Q. All right. Does that come along after the annual inspection?

A. No.

Q. Does it have anything to do with the inspections?

A. No.

Q. Okay. How do you get the stickers?

A. Through the mail.

Q. Okay. Do you have to do some procedure in order to get your documentation sticker?

A. Fill out a form that basically is the same information, no alterations, and mail it in.

Q. Okay. Is that something that's – well, do you do that once a year?

A. Yes.

Q. All right. And do you send that form to the Coast Guard?

A. Send it to – this is not a Coast Guard documentation. I'm not sure where we send it.

Q. All right. What's the next set of documents you have in that group exhibit?

A. This is sent to the National Vessel Response Center.

Q. All right.

[13] A. The oil pollution certificate.

Q. All right. Next thing after that?

A. Radio operator's license.

Q. Explain to me what the radio operator's license is for.

A. For VHF radio.

Q. All right. Does somebody at all times have to have a radio operator's license?

A. Somebody? Meaning –

Q. Yeah. Is there always somebody on board the vessel who has to have a radio operator's license?

A. No.

Q. Is that a license just for the vessel?

A. This is the station license.

Q. Okay.

A. That's for the station.

Q. And is that something that you have to do annually, or is that something – is it a one-time thing?

A. I believe it's ten years. It could – yeah, it's a ten-year certificate.

Q. So that doesn't attach to the vessel? That's just to have the station licensed if you have a vessel here? Do you understand what I'm [14] asking?

A. No.

Q. When you switch from the PLAYERS II to a different boat, do you have to re-do that?

A. Get a different license.

Q. Okay. Let's go ahead to the next document.

A. Tonnage Certificate, two pages.

Q. All right. Hold on a second, and I'll ask you a couple of questions about that. (Pause) what's the next document you have there?

A. Stability letter, three pages.

Q. And what is a stability letter?

A. A marine architect does the stability letter and submits it to the Coast Guard, all the stability calculations telling – concerning the weight and the draft of the vessel.

Q. Is that done when the vessel is built?

A. It's done when it's built and when it exceeds 2 percent of the net tonnage, or gross tonnage.

Q. You have to explain that to me. What does that mean?

A. Any alterations to the vessel that require weight movement or change, if it's 2 percent of the gross weight, then it has to be redone.

Q. All right. Do you know if that was ever done [15] for the PLAYERS II?

A. This is the stability letter for PLAYERS II.

Q. Did it have to be redone or –

A. Yes.

Q. And when did it have to be redone?

A. I don't remember the date.

Q. Does that document –

A. It's 11/18/99.

Q. November 18, '99?

A. Yes.

Q. Okay. And I would assume that's because there was additional weight added to the vessel somewhere?

A. Yes.

Q. Okay. I'm going to take all this stuff. Now, you told me that there was four inspections and then the annual inspection per year. Well, actually, three inspections and then the annual.

Q. All right. Got you. But there's only one here. Does – are the prior inspection materials not kept? Oh, here's the annual.

A. No. In the lower left-hand corner, the three inspections would have been listed here.

Q. Okay. You're talking about on page – the top [16] page of Exhibit – group Exhibit 2, in the lower left-hand corner, there should be – there's an area for a signature for those other three inspections?

A. Yes.

Q. I don't see those, though. There's no – nothing there.

A. Then I would say that the boat was not inspected after that time frame, because we took it out of service.

Q. Okay. What I'm asking you is, for the years prior to 2001, there were inspections as well?

A. Yes.

Q. And do you not keep the documentation for those prior years' inspections?

A. No, we don't keep the old documentation. We're not required to.

Q. Okay. You are required to keep the certificate of inspection that's current?

A. Yes.

Q. All right. We're going to have to kind of break this up a little bit, if it's changed. At some point, the vessel wasn't cruising anymore with passengers, correct?

A. Correct.

[17] Q. And I think that was sometime in June of '99?

A. I believe it was before then, wasn't it?

Q. I'm asking you.

A. I don't remember the exact date.

Q. All right. Just to make this easier, can we – I think the statute passed about that time, or the regulation. So can we just use June of '99 for ease for the date?

A. If that's when the statute passed.

Q. All right. Prior to the time that the – during the time that the boat was still cruising, what was its standard crew once it was here in metropolis?

A. One licensed master, one licensed chief engineer, one licensed mate, one oiler, and eight deckhands, and I believe 13 other additional crew members.

Q. Okay. What do the 13 additional crew members do?

A. They participate in the drills. They're active in the drills.

Q. Okay. On other boats where I've encountered this, those people are generally like security-type people that are also deckhands in an emergency.

[18] A. Yes.

Q. All right. What does the engineer do?

A. The engineer's in charge of the engine room.

Q. And the oiler?

A. Does what the engineer tells him.

Q. Okay.

A. He works for the engineer.

Q. And I assume the mate is in charge of the deckhands?

A. Yes.

Q. And what do the deckhands do?

A. They paint and release the vessel from the dock and tie the vessel off to the dock and other deckhand duties such as trash removal.

Q. Other than these additional required crew, the 13 people, do any of the other people have anything whatsoever to do with the gaming operation?

A. Yes.

Q. Who is that?

A. Who is –

Q. Which of those people have something to do with the gaming function?

A. Do you mean directly or indirectly?

Q. I mean directly.

[19] A. We didn't have any dealers or slot attendants or anything. It was, like, security, which indirectly would have dealings with the gaming and actually training with the hopper fills.

Q. All right.

A. And EVS, which cleans the boat.

Q. Okay. I want to see if I understand your answer correctly. I'm taking out of the equation the 13 additional required crew. Okay?

A. Okay.

Q. Am I missing something? Maybe I am. It's my understanding that there are some people that have the job of acting as deckhands should there be an emergency.

A. Yes.

Q. How many of the regular, everyday crew is that? Is that four people?

A. Thirteen.

Q. Okay. That's where I wasn't sure. It has listed on the certificate of inspection four watchmen.

A. Yes.

Q. What do they do?

A. Watch for fires.

[20] Q. Okay. Do they have anything to do with the gaming function?

A. No.

Q. Do the deckhands have anything to do with the gaming function?

A. No.

Q. The chief engineer and oiler, anything to do with the gaming function?

A. Other than provide current or power, no.

Q. Okay. How about the mate? Does he have anything to do with the gaming function?

A. No.

Q. How about the master?

A. No.

Q. Okay. When the boat quit cruising, okay, when we say that's June of '99 or whenever that happened to be, did the standard crew change?

A. Yes.

Q. How did it change?

A. When the boat was considered continuously moored –

Q. Um-hmm.

A. – we were allowed to operate without a mate and without an oiler.

Q. Okay. Did you still have the eight deckhands?

[21] A. We had – actually, we had nine deckhands, and six of those could be substituted from another department.

Q. Okay. So you went to having one more deckhand on duty?

A. Yes.

Q. But six of those people could be fulfilling other functions on the boat and be deckhands only if necessary?

A. Yes.

Q. Okay.

MR. NIEMIRA: It's on the second page, if you want to read it.

MR. SCHNELLER: All right.

Q. Watchmen, that stayed the same?

A. Yes, I believe. I would have to read it.

Q. Okay. Prior to getting the authority to go with the lesser crew at times when you're not cruising, did you have to go through any testing or inspection by the Coast Guard?

A. I'm not sure what the question is.

Q. Okay. When you're not cruising, you're using a smaller crew.

A. Yes.

Q. Okay. The way the certificate of inspection is [22] written up, it has when cruising and when not cruising.

A. Yes.

Q. Okay. Was that the standard crew required even prior to the continuous mooring? Did you lose me?

A. I believe I did.

Q. Okay. When the vessel –

A. Maybe –

MR. NIEMIRA: Let him ask the question again.

Q. When the vessel switched over to not cruising with patrons aboard –

A. Yes.

Q. – is that when this provision was put into place that you could have –

A. Yes.

Q. – fewer people?

A. Yes.

Q. Okay. And did you have to go through some sort of testing prior to them granting the authority to go with fewer people?

A. No.

Q. Did the vessel have to make a request to allow them to use fewer personnel?

[23] A. Yes.

Q. All right. Yes. And was that a written request?

A. Yes.

Q. Did you prepare that, do you know?

A. Yes.

Q. And did you send that request to the Coast Guard?

A. Yes.

Q. And how did you get your response? Did they just tell you?

A. It would have been a written response.

Q. All right. Do you know where that might be?

A. No.

Q. Okay. During the time that the PLAYERS II was cruising, once it was up here in Metropolis with passengers, was it able to go of its own accord?

A. Yes.

Q. You didn't have to use any aid, navigational – anything to push it, assist it?

A. No.

Q. At the point where the vessel was allowed to take on passengers without leaving the dock, okay, from that point forward, were there ever any cruises with passengers?

[24] A. No.

Q. What I want you to do, as best you can, is go through each and every time that the vessel has left the dock since that date. Can you do that?

A. The vessel left the dock – no, I can't.

Q. Let's just go through the ones that, you can remember. Okay?

A. Okay. I remember doing the quarterly inspections when we proved propulsion. We would go out about a hundred feet and go back to the dock, and that was the end of that.

Q. Okay.

A. And I remember the first one that we did when the boat was – when we switched to not doing the quarterly inspections to only doing one annual propulsion test. We went out about a hundred foot, and we went back in and tied up.

Q. For some time you were going to do quarterly propulsion testing?

A. Yes.

Q. During which the vessel would leave its moorings?

A. Yes.

Q. Okay. How many of those do you think you had?

[25] A. I don't remember.

Q. Maybe the easier way to ask you is this. When did you switch to doing the propulsion testing only once a year?

A. I don't remember the date.

MR. NIEMIRA: Try and give him your best estimate.

A. I would say probably late '99 or early 2000.

Q. All right. so once that started happening, you'd only have to leave the dock for the inspections once a year?

A. Yes.

Q. Let's talk about other than the inspections, okay, for propulsion. Can you recall any other times the boat left the dock?

A. No.

Q. Did the Coast Guard at any point require maritime disaster training?

A. Not other than our required drills.

Q. Tell me about your required drills.

A. We're required to do a man overboard, emergency generator test, fire and emergency drill, allision or collision drill.

Q. How often?

A. Weekly on everything except the emergency [26] generator. That's monthly.

Q. If it's easier to do these one by one, we can, but if we can go through them in one big lump, let's do it that way. Who participates in these drills?

A. The deckhands and the 13 other additional crew members. Deckhands, marine crew and the 13 additional crew members.

Q. Okay. One of the drills is the collision drill?

A. Yes.

Q. And obviously, that's if some other vessel were to come into contact with the PLAYERS II?

A. That would be the allision drill, which is the same thing, same drill.

Q. You don't leave the dock to do those drills?

A. No.

Q. You also do a man overboard drill?

A. Yes.

Q. How does that drill go? What do you do?

A. We throw a dummy in the river, launch a rescue boat, pick the dummy up.

Q. All right. During all this time, obviously, the PLAYERS II, even though it's not cruising, is sitting on the water.

[27] A. Sitting on the water.

Q. All right, what happens in the fire and emergency drill? What do you do?

A. The drill is announced, and the fire teams are assembled, and a simulation of putting the fire out, post a fire watch, and the drill is dismissed.

Q. At any point did the Coast Guard check the amount of time it took for the vessel to get away from the dock?

A. Not that I'm aware of.

Q. Did they have some sort of requirement about the amount of time?

A. Not that I'm aware of.

Q. So they didn't say you have to be able to get out on the water off the dock within X amount of time?

A. No.

Q. When you did these propulsion tests, how long did it take you?

A. Forty-five minutes, roughly.

Q. Let's go through what you had to do in order to cruise.

A. Okay.

Q. Okay? It's on the dock. What have you got to[28] do?

A. You have to disconnect the shore power.

Q. What is the shore power doing?

A. Provides current to the vessel.

MR. NIEMIRA: Electric current.

Q. All electrical power for the vessel is through shore power?

A. All electric power to the vessel that we were using at that time was from shore power.

Q. Okay. What do you have to do to disconnect that?

A. You have to undo the lugs and unplug the cables.

Q. How long does that take you?

A. Approximately 10 to 15 minutes.

Q. Okay. What else do you have to do?

A. You have to unhook the potable water. That's another five minutes. It's usually done at the same time.

Q. As the electrical?

A. Yes.

Q. Is all potable water on the vessel coming from shore?

A. Yes.

Q. Go on. What else do you have to do?

[29] A. We have to unhook the IT connections.

Q. I don't know what that is.

A. Information technology.

Q. All right.

A. Computer hookups, which takes about two minutes.

Q. What do you have to do to unhook that?

A. Unplug a plug.

Q. Okay. As far as the potable water, what do you have to do to unhook that?

A. Unscrew a hard connection. No, wait. That has cam locks. You just have to undo the two lugs and unplug it.

Q. Okay. Anything else that you have to do to get away?

A. Have to unhook the surveillance connections.

Q. Okay.

A. That's another two minutes. Just a plug.

Q. All right. Now, on the PLAYERS II, was the surveillance not on the vessel? It was off the vessel?

A. It was on – it had both capabilities.

Q. Okay. Again, that was just a plug?

A. Yes.

Q. What else did you have to do?

[30] A. Had to disconnect the boat from the barge.

Q. Meaning what?

A. To raise the ramps and to take all the – I believe it's nine tie-off points, disconnect those.

Q. Let's talk about the ramps first.

A. Okay.

Q. How are the ramps raised?

A. With an electric winch.

Q. And how many ramps?

A. There's three.

Q. How long does that take?

A. No, wait – yeah, there was three.

Q. Okay.

A. That took about ten minutes.

Q. Then you said the nine points?

A. Yes.

Q. Tell me what that is.

A. That's where a ratchet – rigging – ratchets, wires and straps – were used to connect the boat to the barge, and they were disconnected.

Q. All right. How long does that take?

A. Fifteen to 20 minutes.

Q. I want your best estimate. In an emergency situation where you had to get away from the [31] dock, how quick could you do it?

A. In an emergency situation, in 15 to 20 minutes.

Q. Other than for these inspections for propulsion, it was never, that you can recall, taken away from the dock?

A. No.

Q. I guess what I'm really wondering about, did you ever take the vessel away from the dock to get the drift out?

A. No.

Q. You did not?

A. No.

Q. How did you get the drift out?

A. We used – we contracted that with another boat.

Q. And they would actually come clean it out?

A. They'd wash it out.

Q. Okay. From the river side?

A. Yes. I'm not sure I understand that question, "from the river side." What does that mean?

Q. What I meant is, do they do that from the barge or from your vessel, or are they actually doing that from down on the river from their vessel? Does that make sense?

A. No.

[32] (Mr. Kinney entered the deposition room.) (The requested portion of the record was read by the reporter.)

Q. Okay. What I'm asking is, when they got the drift out, did they have to board the PLAYERS II?

A. No.

Q. Okay. Did they have to board the dock barge?

A. No.

Q. To the best of your recollection, in July and August of 2000, was there anything about the river which prevented you from cruising?

A. No.

Q. And obviously, because the cruise before that – well, was there anything about the boat that prevented it from cruising in July and August of 2000?

A. No.

MR. NIEMIRA: Other than the fact it was tied off. Is that what you mean?

Q. Yeah. Was the vessel capable of cruising?

A. Yes.

Q. All right. And was there – I know we had the big smokestacks on top. In this portion of the Ohio River, was it still able to go under any [33] close bridges?

A. At certain water levels.

Q. All right. Tell me about that. What water levels couldn't it go under, what bridges?

A. I don't remember.

Q. All right. Where is the nearest bridge that you would have a problem with?

A. A few hundred feet downstream from where the boat was docked.

Q. You're talking about the railroad bridge?

A. Yes. P & L Railroad bridge.

Q. There are times when the vessel with those smokestacks could not go under that bridge?

A. Yes.

Q. Do you know what kind of water level you had to have?

A. Approximately 28 feet on the Lock 52 lower gates.

Q. Is there – what's the standard, normal water level?

A. The Dam 53 pool is nine foot.

Q. All right. So we're talking pretty high water for that to have any impact?

A. I wouldn't consider 28 foot extremely high. I would consider it higher than normal.

[34] Q. Okay. And is the only reason it couldn't get under that bridge because of those smokestacks?

A. Yes.

Q. All right. And we're talking about there was two smokestacks that were – they weren't actually used, were they?

A. Depends on what you call huge.

Q. I'm sorry, you misunderstood me. Did those smokestacks that were put on the top deck, the two of them, were they functional?

A. No. Oh, you said "used." I'm sorry.

Q. Yeah. All right. Were there any other connections other than the ones you described that you have to disconnect in order to get away from the dock?

A. Not that I can recall.

Q. All right. Let's talk about the engine on the PLAYERS II, okay? How many engines?

A. Two.

Q. Used for what?

A. Main propulsion.

Q. All right. When the PLAYERS II was taken away from here – and I believe it's now sitting in Texas somewhere?

A. Yes.

[35] Q. When it was taken away from here, is the only thing you had to do, other than disconnecting all these things, to lower those two smokestacks?

A. We serviced all the engines, the normal routine things that you would do before a long trip.

Q. Did you participate in taking the PLAYERS II out of here?

A. No.

Q. No?

A. No.

MR. NIEMIRA: Let him finish his question, okay, George?

Q. Did you have any assist boats when the vessel was taken from here?

A. Not that I'm aware of.

Q. Just so we're clear, is the reason – at a 28-foot river level, is the reason the PLAYERS II couldn't get under the bridge down here, the railroad bridge, because of those smokestacks?

A. Yes.

Q. If those were gone, would the vessel have been able to get under the railroad bridge?

A. Once again, I'm not sure on the water level. With those gone, I recall that it could.

[36] Q. All right. The PLAYERS II had bow thrusters?

A. Yes.

Q. All right. Backup generator, emergency generator?

A. Yes.

Q. Would those run off the two main engines?

A. No.

Q. That was separate?

A. Yes.

Q. Okay. What else – what other things did you have to have separate?

A. Had two main generators.

Q. Okay. How did the generators run?

A. Off the diesel engine.

Q. Did the boat have a bridge?

A. Yes.

Q. What goes on up in the bridge? What's up there?

A. Radar, the controls for steering the boat, along with the throttles and all the aids to navigation.

Q. Okay. What sort of aids to navigation?

A. Radar.

Q. Radio?

A. Radios.

[37] Q. Depth finder?

A. Depth finder.

Q. Okay. Anything else that you can think of?

A. No.

Q. Were all these things fully functional in July and August of 2000?

A. Yes.

Q. Obviously, they had to be, because you passed your inspections?

A. Yes.

Q. Now, in the inspections, there's certain things that are required. Okay? Maybe you might want to read this. It will make it easier for both of us. Looking at page 3 –

MR. NIEMIRA: Why don't you list them first and then read, okay?

Q. What were the requirements as far as lifeboats or life rafts?

A. Two rescue boats, eight 25-man inflatable rafts.

Q. Okay. What are the rescue boats? Can you describe them for me?

A. They're 12 foot long and approximately – probably five foot wide with a 9.9 outboard engine.

[38] Q. All right. How long does it take to get those into the water?

A. Just a couple of minutes.

Q. And where are they kept?

A. On that boat they were kept on the top deck.

Q. And how would you get – drop those down to water level?

A. With a boat davit.

Q. And how about the inflatable rafts? What are we talking about there?

A. We're talking about inflatable rafts, 25-man capacity.

Q. Where are they kept?

A. They're in racks on the top deck.

Q. How are they inflated?

A. They're self-inflated.

Q. What do you do to make them work?

A. Push them off the side. And when the cord – the tending line's pulled, it inflates the raft.

Q. Obviously, those things are required by the Coast Guard?

A. Yes.

Q. In addition, you're required to have life preservers?

[39] A. Yes.

Q. And how many?

A. 1904.

Q. Is the crew required to keep separate – meaning your deckhands, engineer – separate flotation devices?

A. No.

Q. Okay. So that's part of the 1904?

A. Yes.

Q. All right. Do you require that your crew wear PFDs?

A. Yes.

Q. Even when it was docked?

A. When they were outside the handrails.

Q. All right. So that's clear, when the crew – even when the boat was just docked, when the crew is outside the handrails, they had to wear a personal flotation device?

A. Yes.

Q. Like a work vest variety?

A. Yes.

Q. All right. You also had to have six ring buoys?

A. Yes.

Q. That doesn't add up very well. Two with [40] lights, two with line attached, and four other; is that right?

A. Yes.

Q. All right. And then the Coast Guard had some other requirements as far as firefighting equipment, fire extinguishers, et cetera –

A. Yes.

Q. – when the vessel was docked. So after the period when you no longer had to cruise with passengers, how often do you start the diesel engines?

A. We start them once every two weeks.

Q. For what purpose?

A. Just to maintain consistency in starting.

Q. How long do you run them, then, once you start them?

A. About 20 minutes.

Q. I guess that would allow the engineer time to make sure that everything's operational?

A. Yes.

Q. You told me that you have shore power for the electric?

A. Yes.

Q. What power source do you use for the heating and cooling on the vessel?

[41] A. It's electrically driven.

Q. Okay.

A. It's a water-cooled HVAC system.

Q. That system is actually on the vessel?

A. Yes.

Q. But you're getting the power from the shore electric?

A. Yes.

Q. At the time the vessel was docked, so you weren't cruising, the vessel still had all the things that are sort of gone through in the stability letter? For instance, you still had the water-tight bulkheads?

A. Yes.

Q. Still had bilge pumps?

A. Yes.

Q. Tell me what a bilge pump is.

A. Bilge pump is a pump that pumps the bilges.

Q. Where is it located?

A. It's located – the one – on that boat, one was located in the engine room, and one was located in the bow thruster room.

Q. You didn't remove the watertight doors or anything like that?

A. No.

[42] MR. KINNEY: Is that a group of exhibits that was produced today pursuant to the notice?

MR. NIEMIRA: That's group Exhibit 2. No. 1 is the affidavit from the motion, which you should have.

MR. KINNEY: Great. Thanks.

MR. SCHNELLER: I'm almost done.

Q. You told me about these tests – I'm sorry, the man overboard, the emergency generator, fire and emergency drills, the collision drill.

A. Yes.

Q. Okay. Besides those, you don't do any other periodic maritime disaster drills?

A. We did an occasional – or actually, we did a simulated abandon ship.

Q. Was that done at the request of the Coast Guard?

A. Yes.

Q. When did you do that?

A. Weekly.

Q. What goes on in that drill?

A. We did that drill in conjunction with closing at night when everyone was exited. And it was just the proper way and the quickest way to sweep the boat for the passengers to leave.

[43] Q. Okay. So you're doing that drill when it's closing time? You're actually doing it with passengers on board as you're getting them off?

A. Yes.

Q. As far as the other drills besides this abandon ship, do you do any of these drills while passengers are on board the vessel?

A. Occasionally.

Q. When they took the vessel – I'm assuming that it went directly from here to Texas. Is that correct, or do you know?

A. Yes.

Q. Yes, it is correct?

A. Yes.

Q. Was a crew hired to take it down or –

A. It was a combination of in-house crew and a hired crew.

Q. Are there crew quarters on board the PLAYERS II?

A. No.

Q. There is a crew break room or something like that, is there not?

A. There was a break room.

Q. Did the crew use that?

A. Yes.

* * *

[45] tests that the vessel left the dock?

A. Still can't think of another time it left the dock.

MR. SCHNELLER: All right. I think that's all the questions I have.

MR. NIEMIRA: Let's take five.

(A recess was taken.)

MR. NIEMIRA: For purposes of the summary judgment motion, we'll waive signature, but we want to reserve it for any other purpose in the case.

MR. KINNEY: I don't have any questions. (The deposition was concluded at 1:15 p.m.)

_____
GEORGE A. CARPENTER

STATE OF_____)
COUNTY OF_____)

I certify that this deposition was signed in my presence by GEORGE A. CARPENTER on the ___day of _____, 2002.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office on this the ___ day of _____, 2002.

_____
Notary Public,
State of _____

My commission expires_____

EXHIBIT 2

CERTIFICATION DATE: 28SEP01
EXPIRATION DATE: 04OCT02

[SEAL] **UNITED STATES OF AMERICA**
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

Certificate of Inspection

VESSEL NAME	OFFICIAL NUMBER	CALL SIGN	SERVICE
PLAYERS RIVERBOAT CASINO II	D997773	WCW7257	PASSENGER

HOME PORT	HULL MATERIAL	HORSE-POWER	PROPULSION
NATL VESSEL DOC CTR	STEEL	1600	DIESEL REDUCTION

PLACE BUILT	DATE BUILT	GROSS TONS	NET TONS	DWT	LENGTH
JENNINGS LA	26NOV93	1430	972		190.90

OWNER
SOUTHERN ILLINOIS
RIVERBOAT CASINO
CRUISES, INC
203 SOUTH FERRY STREET
METROPOLIS, IL 62960

OPERATOR
PLAYERS RIVERBOAT
CASINO
203 SOUTH FERRY STREET
METROPOLIS, IL 62960

THIS VESSEL MUST BE MANNED WITH THE FOLLOWING LICENSED AND UNLICENSED PERSONNEL, INCLUDED IN WHICH THERE MUST BE 0 CERTIFICATED LIFEBOATMEN AND 0 CERTIFICATED TANKERMEN.

1	MASTER	___	MASTER & 1ST CLASS PILOT
___	CHIEFMATE	___	_____ CLASS PILOT
___	2ND MATE	___	RADIO OFFICER(S)
1	LIC _____ MATES	___	OPERATOR(S)

___	ABLE SEAMAN	1	CHIEF ENGINEER
___	ORDINARY SEAMEN	___	1ST ASST. ENGINEER
8	DECKHANDS	___	2ND ASST. ENGINEER
4	* WATCHMEN	___	_____ ENG'RS

___ FIREMEN-WATERTENDERS
1 OILERS
___ _____
___ _____

OTHER REQUIRED CREW 13 * STATION BILL PERSONNEL

IN ADDITION, THIS VESSEL MAY CARRY 1636 PASSENGERS. ___ OTHER PERSONS IN CREW, ___ PERSONS IN ADDITION TO CREW, AND 235 "ADDITIONAL CREW MEMBERS". TOTAL PERSONS ALLOWED: 1900

ROUTE PERMITTED AND CONDITIONS OF OPERATION:

RIVERS:

AT ALL TIMES WHEN PASSENGERS ARE EMBARKED, THE BRIDGE OR OTHER APPROPRIATE LOCATION SHALL BE MANNED BY A QUALIFIED MEMBER OF THE CREW. FROM THIS STATION, THE WATCH SHALL CONTINUOUSLY MONITOR CHANNEL 16 AND OTHER BRIDGE-TO-BRIDGE FREQUENCIES, AS APPROPRIATE; OBSERVE OTHER VESSEL TRAFFIC; HAVE THE ABILITY TO ALERT PASSENGERS AND OTHER CREW; AND HAVE THE ABILITY TO DIRECT INITIAL ACTION IN THE EVENT OF AN EMERGENCY.

* A MAXIMUM OF FOUR (4) "ADDITIONAL CREW MEMBERS" MAY BE USED TO SATISFY THE REQUIREMENT FOR DECKHANDS.

* DURING NIGHTTIME HOURS, FOUR (4) "ADDITIONAL CREW MEMBERS" SHALL BE ASSIGNED DUTIES AS WATCHMEN TO PERFORM THE DUTIES SPECIFIED BY 46 CFR 78.30-15.

* THIRTEEN (13) PERSONS ARE REQUIRED TO SATISFY STATION BILL DUTIES. "ADDITIONAL CREW MEMBERS" MAY BE ASSIGNED TO PERFORM THESE DUTIES.

WHEN THE VESSEL IS AWAY FROM THE DOCK, OR HAS PASSENGERS ON BOARD OR HAVE ACCESS TO THE VESSEL FOR A PERIOD EXCEEDING TWELVE (12) HOURS IN A TWENTY-FOUR (24) HOUR PERIOD, AN ALTERNATE CREW MUST BE PROVIDED.

ANY PASSENGER CONFINED TO THE HOLDING CELL SHALL BE UNDER CONSTANT SUPERVISION OF A CREWMEMBER WHO SHALL HAVE THE CAPABILITY TO IMMEDIATELY RELEASE THE PASSENGER IN AN EMERGENCY.

IF CHILDREN ARE CARRIED A SUFFICIENT NUMBER OF CHILDREN'S LIFE PRESERVERS SHALL BE PROVIDED.

IF THE NUMBER OF ADDITIONAL CREW MEMBERS IS DECREASED, THEN THE NUMBER OF PASSENGERS MAY BE INCREASED BY A CORRESPONDING FIGURE, WITH THE TOTAL PERSONS NOT TO EXCEED 1900.

WHEN OPERATING DOCKSIDE, THE FOLLOWING MINIMUM CREW IS REQUIRED:

1 – MASTER	9 – * DECKHANDS
1 – CHIEF ENGINEER	4 – * WATCHMEN

* A MAXIMUM OF SIX (6) "ADDITIONAL CREW MEMBERS" MAY BE ASSIGNED DUTIES AS DECKHANDS.

* DURING NIGHTTIME HOURS, A MAXIMUM OF THREE (3) DECKHANDS SHALL BE ASSIGNED DUTIES AS WATCHMEN TO PERFORM THE DUTIES SPECIFIED BY 46 CFR 78.30-15.

--- ITC TONNAGES ---

GROSS/ 3860 NET/ 1294

--- HULL EXAMS ---

–EXAM TYPE–	–NEXT EXAM–	–LAST EXAM–	–PRIOR EXAM–
DRYDOCK	30SEP02	31OCT95	29NOV93
INTERNAL STRUCTURAL	22NOV05	22NOV00	31OCT95

--- STABILITY ---

LETTER APPROVAL DATE/ 18NOV99 OFFICE/ GMSC

--- INSPECTION STATUS ---

* FUEL TANKS *

– TANK IDENTIFICATION –	– DATE EXAMINED –
PORT F/O	31OCT95
STBD F/O	31OCT95

* PRESSURE VESSELS *

TYPE	LOCATION	LAST	NEXT
AIR RECEIVER	ENGINE ROOM	07OCT97	07OCT02
AIR RECEIVER	ENGINE ROOM	07OCT97	07OCT02

* TAILSHAFT(S) *

TAILSHAFT ID	DATE DRAWN	NEXT DUE DATE
STARBOARD	31OCT95	30SEP02
PORT	31OCT95	30SEP02

* LIFESAVING *

LIFEBOAT/ RAFT IDENTIFICATION	SERVICED/ REFURBISHED
259374	05OCT00
259376	04OCT00
ER2593U5059	04OCT00

259378	05OCT00
259377	04OCT00
259379	04OCT00
259375	05OCT00
ER2593U5062-02	05OCT00

WEIGHT TEST	FALLS RENEWED	FALLS END/END

--- LIFESAVING ---

	NUMBER	PERSONS
TOTAL EQUIPMENT FOR		1900
LIFEBOATS (TOTAL)		
LIFEBOATS (PORT)*		
LIFEBOATS (STARBD)*		
MOTOR LIFEBOATS*		
LIFEBOATS W/RADIO*		
RESCUE BOATS/PLATFORMS	2	
INFLATABLE RAFTS	8	200
LIFE FLOATS/BOUYANT APP		
WORKBOATS (NOT REQUIRED)		

	REQUIRED
LIFE PRESERVERS (ADULT)	1904
LIFE PRESERVERS (CHILD)	
RING BUOYS (TOTAL)	6
WITH LIGHTS*	2
WITH LINE ATTACHED*	2
OTHER*	4
IMMERSION SUITS	
PORTABLE LIFEBOAT RADIOS	
EQUIPPED WITH EPIRB?	NO

(* INCLUDED IN TOTALS)

--- FIRE FIGHTING EQUIPMENT ---

TOTAL HOSE LENGTH/ 1000	NUMBER OF FIRE AXES/ 8	NUMBER OF FIRE PUMPS/ 2

* FIXED EXTINGUISHING SYSTEMS *

SPACE PROTECTED	AGENT	CAPACITY
ENGINE ROOM	CO2	1000
GENERATOR ROOM	CO2	100
BOW THRUSTER ROOM	CO2	500

* FIRE EXTINGUISHERS – HAND PORTABLE AND SEMI-PORTABLE *

18	A-II	B-I	10	B-II	B-III
	B-IV	B-V		C-I	C-II

*** END ***

WITH THIS INSPECTION HAVING BEEN COMPLETED AT CASINO LANDING ON 28 SEP 01, THIS VESSEL IS CERTIFIED BY THE OFFICER IN CHARGE, MARINE INSPECTION, PADUCAH, KY, TO BE IN ALL RESPECTS IN CONFORMITY WITH THE APPLICABLE VESSEL INSPECTION LAWS AND THE RULES AND REGULATIONS PRESCRIBED THEREUNDER.

PERIODIC REINSPECTIONS

DATE	ZONE	SIGNATURE

THIS CERTIFICATE ISSUED BY

/s/ PT Keane

P. T. KEANE, CDR, USCG

OFFICER IN CHARGE, MARINE INSPECTION

PADUCAH, KY

INSPECTION ZONE

EXHIBIT 3

[SEAL] **UNITED STATES OF AMERICA**
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

Certificate of Documentation

VESSEL NAME	OFFICIAL NUMBER	HAILING PORT
PLAYERS RIVER-BOAT CASINO II	997773	METROPOLIS, IL

GROSS -ITC	NET -ITC	LENGTH
3860	1294	190.9

BREADTH	DEPTH	HULL MATERIAL
60.0	11.0	STEEL

SELF PROPELLED
YES

PLACE BUILT	YEAR BUILT
JENNINGS LA	1993

OWNER	OPERATIONAL ENDORSEMENTS
SOUTHERN ILLINOIS RIVERBOAT CASINO CRUISES INC.	COASTWISE
COMPLETE RECORDS ON FILE AT: NATL VESSEL DOC CTR	

MANAGING OWNER

SOUTHERN ILLINOIS RIVERBOAT
CASINO CRUISES INC
207 FERRY STREET
METROPOLIS, IL 62960

RESTRICTIONS

NONE

ENTITLEMENTS

NONE

REMARKS

NONE

THIS CERTIFICATE MAY NOT BE ALTERED EXCEPT BY AFFIXING OFFICIAL RENEWAL AND ADDRESS CHANGE DECALS ON THE REVERSE.

ISSUED AT	SIGNATURE AND SEAL
NATL VESSEL DOC CTR	/s/Wendy D. Rhoads WENDY D. RHOADS
ISSUE DATE SEPTEMBER 18,1996	
THIS CERTIFICATE EXPIRES ON THE LAST DAY OF SEP97 UNLESS RENEWED BY DECAL ON REVERSE	

EXHIBIT 4

Department of Transportation

United States Coast Guard
National Pollution Funds Center
Arlington VA 22203-1804

[LOGO] [LOGO]

No. *837597-12*

VESSEL CERTIFICATE OF FINANCIAL RESPONSIBILITY (WATER POLLUTION)

Vessel Operator
SOUTHERN ILLINOIS RIVERBOAT CASINO CRUISES, INC.

has established evidence of financial responsibility, in accordance with 33 CFR 138, to meet liability under section 1002 of the Oil Pollution Act of 1990, and under section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act, which may result from the operation of the vessel named below:

Name of Vessel
PLAYERS RIVERBOAT CASINO II

Effective Date: *11 JUN 99*
Expiration Date: *11 JUN 02*

The use of this certificate is subject to the provisions of Part 138 of Title 33 of the Code of Federal Regulations, as it is or may be amended, and the conditions on the reverse side of this certificate. This certificate is invalid if there are any erasures or alterations hereon (except permitted

by 33 CFR 138), and is void if the operator named hereon is not the party responsible for operating the vessel.

[LOGO] /s/ Edward C. Armstrong
Chief, Vessel Certification
National Pollution Funds Center
By Direction

EXHIBIT 5

UNITED STATES OF AMERICA
FEDERAL COMMUNICATIONS COMMISSION

SOUTHERN ILLINOIS RIVERBOAT CASINO CRUIS 00010
203 SOUTH FERRY ST
METROPOLIS IL 62960

NOTE: LICENSES ARE NOW ISSUED FOR A TEN YEAR LICENSE TERM.

SHIP/AIRCRAFT RADIO STATION LICENSE

(MUST BE POSTED ABOARD, AIRCRAFT OR SHIP)

<table>
<tr><td>Radio Service

SHIP</td><td colspan="2">FAA No./FCC Control No./ Official Ship No.
997773</td><td>Ship Radio Call Sign
WCW7257</td><td rowspan="4">FEDERAL COMMUNICA-TIONS COMMISSION
[LOGO]
GETTYSBURG, PA 17325-7245</td></tr>
<tr><td>Effective Date

07-10-1996</td><td>Expiration Date

07-10-2006</td><td>No. Ship/ Aircraft in Fleet</td><td>Selective Calling Number</td></tr>
<tr><td colspan="3">Name of Ship

PLAYERS RIVERBOAT CASINO II</td><td>Duplicate/ Supersede</td></tr>
<tr><td>Ship Station Identify</td><td>INMARSAT Number</td><td>Radio Re-quirements/ Category
E</td><td>Type of License Regular</td></tr>
<tr><td colspan="5">Frequencies and Special Conditions
VHF/FM Radiotelephone (156-158 MHz)
Radar (2900-3100 MHz) and/or (9300-9500 MHz)</td></tr>
</table>

CONDITIONS OF GRANT

GENERAL

Subject to the provisions of the Communications Act of 1934, as amended, subsequent acts, or treaties, and all rules made by this Commission, and further subject to the terms and conditions of this license, the licensee is granted a station license for the radio transmitting apparatus located on board this aircraft or ship for the transmission of radio communications.

This license shall not vest in the licensee any right to operate the station nor any right in the use of frequencies designated in the license beyond the term hereof, nor in any other manner than authorized herein.

Neither the license nor the right granted hereunder shall be assigned or otherwise transferred in violation of the Communications Act of 1934 as amended.

This license is subject to the right of use of control by the government of the United States conferred by Section 706 of the Communications Act of 1934, as amended.

The frequencies within the designated bands are authorized for use in accordance with Parts 80 or 87 of the Commission's Rules for ship and aircraft, respectively.

This license authorizes the operation of the radio station on the specific aircraft or ship identified in the application, or if aircraft or ship is not identified, authorizes operation of the radio station in accordance with the Commission's Rules governing fleet aircraft stations or portable or fleet ship stations.

This license authorizes use of transmitters type accepted or approved by the Commission's Rules to operate in the

frequency specified on this license in accordance with Parts 80 or 87 of Commission's Rules for ships and aircraft, respectively.

Licensees shall return this license to the Federal Communications Commission, 1270 Fairfield Road, Gettysburg, PA 17325-7245, * * * request cancellation of the license when the ship or aircraft * * * transferred to a different owner or the radio station is permanently deactivated.

SPECIAL

1. Should harmful interference be caused by the use of any of * * * frequencies. It shall be the obligation of the licensee to co-operate to the fullest extent with the station interfered with and with * * * operating agencies and administrations concerned in the interest of alleviating the interferences. Action taken shall be in accordance with applicable rules, regulations, treaties and established procedures.

2. This authorization is valid until the expiration date of the license or until the termination of the Government Contract and Succeeding Contracts for which it is issued, whichever is earlier. Succeeding Contracts shall be for Services which can be provided under the technical characteristics specified. * * * numbers shall be forwarded to the Commission.

EXHIBIT 6

[LOGO] DET NORSKE **VERITAS**	TONNAGE CERTIFICATE THE UNITED STATES OF AMERICA	DnVC Id. No.: 50159

Vessel Name:	Players Riverboat Casino II	Registered Length: 190.9 feet
Port:	New Orleans, LA	Registered Breadth: 60.0 feet
Official No.:	997773	Registered Depth: 11.0 feet
Builder:	Leevac Shipyard	Hull Number: 308
Place Built:	Jennings, LA	Date Built:1993
Rig:	Oil Screw	

Registered tonnages

Gross tonnage: 3860 = Net Tonnage: 1294 =

Date assigned: 16 November 1993 By: DNVC

Calculated under 46 CFR Part 69, Subpart B

Remarks/Restrictions:

Regulatory tonnages (not for vessel documentation purposes)

Gross tonnage: 1430.87 Net Tonnage: 972 =

Date assigned: 16 November 1993 By: DNVC

Calculated under 46 CFR Part 69, Subpart C

Remarks/Restrictions:

Tonnages must be used for all provisions of law under 46 USC 14305.

The undersigned declares that he is duly authorized by the United States Government to issue this certificate

PHIL E. ESSEX (SEAL)
Tonnage Surveyor

Issued at River Edge, NJ the 16th day of November 1993

Vessel Name: Players Riverboat Casino II
Service: Passenger/Coastwise

Regulatory tonnages were determined by omitting the following spaces and their corresponding tonnages from inclusion in gross tonnage.

Passenger Spaces 2090.30	Companions 52.54	Light or air
Skylights and air	Wheelhouse 24.31	Water Closets 118.09
Other machinery 19.08	Galley	Anchor gear
Steering gear	Dry cargo & stores	

Water ballast:

Tank	Location	Tonnage
Forepeak		
Afterpeak		
Other tanks (list each separately)		
	TOTAL	

The above water ballast exemption is _____ percent of the vessel's gross tonnage (as calculated without any allowance for water ballast). If over 30 percent, water ballast was approved by the Coast Guard on (date): _____

Open Spaces

Structure	Location	Tonnage
Forecastle		
Shelter deck		
Deckhouses (list each separately)		
R.H. 1st Tier	Fr. 37-105	951.76
	TOTAL	951.76

The following tonnage stations are limited by deep floors or deep side framing:

Station numbers _____

EXHIBIT 7

U.S. Department of Transportation [LOGO]

United States Coast Guard

Commanding Officer
United States Coast Guard
Marine Safety Center

400 7TH Street, S.W.
Washington, DC 20590-0001
Staff Symbol: MSC-1
Phone: (202) 366-6481
FAX: (202) 366-3877

STABILITY LETTER

16710/P002015
Ser. H2-9905825
November 18, 1999

Master, PLAYERS RIVERBOAT CASINO II, O.N.997773
Leevac Hull 308
242' x 6' x 11' Passenger Vessel (H)

You are responsible for maintaining this vessel in a satisfactory stability condition at all times and for following the instructions and precautions listed below. All log entries required by 46 CFR 78.17-20 and 46 CFR 78.17-22 shall be made prior to getting underway for each voyage.

A deadweight survey, witnessed by the U.S. Coast Guard, was conducted on PLAYERS RIVERBOAT CASINO II, O.N.997773, at Metropolis, IL on October 12, 1999. On the basis of that survey and a conservatively assumed light ship vertical center of gravity, stability calculations have been performed. Results indicate that the stability of the PLAYERS RIVERBOAT CASINO II, as presently outfitted and equipped, is satisfactory for operation on Protected Waters, provided that the following restrictions are observed.

SUBDIVISION

When operated as indicated below, calculations indicate this vessel will remain afloat with any two adjacent major compartments flooded (two-compartment subdivision). A major compartment is the total space between any two adjacent Main Transverse Watertight Bulkheads (MTWB's). For this vessel these MTWB's are located at frames 8, 16, 24, 35, 52, 66, 76, 85 and 93.

DAMAGE SURVIVAL

Calculations indicate this vessel will stay upright (no more than 7 degrees of list under ideal conditions) after side

damage when the side damage is limited to any two adjacent major watertight compartments and not more than 12 feet inboard from the side of the hull. To maintain the vessel upright after flooding (damage), the heeling forces imposed by wind, wave, and passenger movements must be minimized. The calculations do not specifically account for high winds, heavy seas, or the movement of many passengers to one side.

OPERATING RESTRICTIONS

1. ROUTE: Operation on Protected Waters is permitted. Since the route is based upon other considerations in addition to stability, you are cautioned that the route may be further limited to that specified on the Certificate of Inspection.

2. PERSONNEL:

a. A maximum of 1900 persons may be carried aboard this five-deck vessel, of which 1629 may be passengers. A maximum of 413 persons is permitted on the uppermost (Bridge) deck at any time. A maximum of 1487 persons is permitted on the Texas Deck at any time.

b. Since the personnel capacity is based upon other considerations in addition to stability, you are cautioned that the number of persons carried and their distribution may be further limited to that specified on the Certificate of Inspection.

3. FREEBAORD AND DRAFT:

a. The draft at amidships must not exceed 6 feet 7-¼ inches. This corresponds to a freeboard of at least 4 feet 7-¼ inches measured from the main deck amidships, located 9-½ inches aft of frame 50. The draft aft must not exceed

6 feet 10-¾ inches. This corresponds to a freeboard of at least 6 feet ¾ inches measured at the aft draft marks.

b. Since the total weight of passengers, variable stores, and tankage may be greater than the assumed weights in the full load condition, you are cautioned that when carrying a full load to carefully monitor the vessels draft as it is possible to exceed the above restriction.

4. WATERTIGHT DOORS AND BULKHEADS:

a. The Class 1 watertight doors located at frames 16, 52, 76, 85, and 93 shall be closed and properly dogged at all times while underway, except when actually used for transit under safe conditions. There are Class 3 sliding watertight doors at frames 24 and 35.

b. No watertight bulkheads shall be removed or altered without the authorization and supervision of the cognizant Officer in Charge, Marine Inspection (OCMI).

5. HULL OPENINGS: Any openings that could allow water to enter into the hull or deckhouse should be kept closed when rough weather or sea conditions exist or are anticipated.

6. WEIGHT CHANGES: This stability letter has been issued based upon the following light ship parameters:

Displacement	1462.23	Long Tons (LT)
VCG	22.84	Feet above the baseline
LCG	13.44	Feet aft of amidships

The VCG has been conservatively estimated in lieu of determination by an inclining experiment, as allowed by 46 CFR 170.175(d). Any alteration resulting in a change in these parameters may invalidate this stability letter. No

fixed ballast or other such weights shall be added, [illegible] altered and/or relocated without the authorization and supervision of the cognizant OCMI. The vessel is not fitted with permanent ballast.

7. DECK CARGO: No deck cargo may be carried.

8. BILGES: The vessel's bilges and voids shall be kept pumped to minimum content at all times consistent with pollution prevention requirements.

9. FREEING PORTS: Deck freeing ports shall be maintained operable and completely unobstructed at all times.

10. LIST: You should make every effort to determine the cause of any list of the vessel before taking corrective action.

This stability letter shall be posted under glass or other suitable transparent material in the pilothouse of the vessel so that all pages are visible. It supersedes any stability information previously issued to the vessel.

/s/ R. J. Petow
R. J. PETOW
Commander, U.S. Coast Guard
Chief, Hull Division
By direction of the
Commanding Officer

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
BENTON DIVISION

JOHN HOWARD, *et al.*,	)	
Plaintiffs,	)	
vs.	)	
SOUTHERN ILLINOIS RIVERBOAT/CASINO CRUISES, INC. d/b/a Players Riverboat Casino; and HARRAH'S ILLINOIS CORPORATION, a Nevada corporation	)	Case No. 00-4321-GPM
Defendants/Third Party Plaintiffs,	)	
vs.	)	
TRIANGLE INSULATION AND SHEET METAL COMPANY,	)	
Third Party Defendant.	)	

DEFENDANT/THIRD-PARTY PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

COMES NOW defendant/third-party plaintiff Southern Illinois Riverboat/Casino Cruises, Inc. d/b/a Players Island Casino ("Players"), by and through counsel, and move this court for summary judgment pursuant to FED.R.CIV.P. 56 with regard to the claims of all plaintiffs, as there is no genuine issue as to any material fact and Players is entitled to judgment as a matter of law. In support thereof Players states to the Court as follows:

1. Plaintiffs have brought this action for personal injuries against Players, their employer, under the provisions of 46 U.S.C. App. § 688 (1994) (commonly known as the Jones Act), and the general maritime law of the United States.

2. To recover under the Jones Act and general maritime law, plaintiffs must be seamen, *Grobe v. Hollywood Casino*, 795 N.E.2d 154, 158 (Ill. App. Ct. 2001), *citing Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560, 565 (5th Cir. 1995).

3. To qualify as seamen, plaintiffs must serve aboard a vessel "in navigation." *Grobe* at 158 *citing Chandris, Inc. v. Latsis*, 515 U.S. 347, 373, 132 L. Ed.2d 314, 340, 115 S.Ct. 2172, 2192 (1995).

4. For a vessel to be one "in navigation," its purpose "must be, to some reasonable degree, the transportation of passengers, cargo, or equipment across navigable waters." *Grobe* at 159 *citing Johnson v. John F. Beasley Construction Co.*, 742 F.2d 1054, 1063 (7th Cir. 1984).

5. At the time of plaintiffs' alleged injuries, the M/V Players II was located on the Ohio River in Massac County, Illinois. The Players II was taken out of service as a casino at the Metropolis location as of September 11, 2001. (*See* Affidavit of Jeff Pfeiffer, attached hereto and marked as Exhibit A, and incorporated herein by reference).

6. After June 26, 1999, when a change in Illinois law allowed gaming on dockside casinos, Players discontinued cruising the Ohio River and had no intention to resume cruising with the Players II as part of casino operations. (*See* Exhibit A).

7. On July 28-29, 2000, at the time of Plaintiffs' alleged injuries, the Players II was not transporting passengers, cargo or equipment. (*See* Exhibit A). At the time of Plaintiffs' alleged injuries, the Players II was permanently moored to a dock consisting of two connected barges which were permanently attached to the shore. (*See* Exhibit A).

8. The Players II was connected to land based utilities such as electricity, telephones, computer surveillance hard lines, water and sewer. (*See* Exhibit A).

9. Although no longer cruising as part of casino operations after June 1999, the casino remained licensed and classified as a passenger vessel with the United States Coast Guard, remained equipped with firefighting and safety equipment, had internal diesel engines for propulsion if necessary, and Players continued to employ a captain and crew who are qualified to move the casino when required to do so for testing by the Coast Guard. (*See* Exhibit A).

10. Since June of 1999, the Players II left its moorings no more than once every three months for propulsion testing mandated by the United States Coast Guard. On those limited occasions, no patrons or passengers were on board. (*See* Exhibit A).

11. As of June of 1999, in order for the Players II to leave the dock, all utility lines had to be disconnected, three ramps raised, and numerous cables and tie-off points and connections, which held the casino in place, had to be disconnected by a process requiring the use of numerous tools. (*See* Exhibit A).

12. The Players II was not, at the time of plaintiffs' injuries, a vessel "in navigation" for purposes of the Jones Act or general maritime law.

13. As the Players II was not a vessel "in navigation," plaintiffs do not qualify as seamen under the Jones Act or general maritime law, and cannot prosecute claims under the Jones Act and general maritime law. *Grobe* at 161.

14. As there exists no genuine issue of material fact in this regard, Players is entitled to judgment as a matter of law.

15. The decision of *Grobe v. Hollywood Casino*, 795 N.E.2d 154, 158 (Ill. App. 2nd Dist. 2001), defining whether an Illinois casino vessel is "in navigation" for purposes of deciding whether its employers are seamen, was handed down nearly a year after Players filed for limitation of liability. At the time of filing the limitation of liability action, Players did not have the definitive guidance of the Illinois Court of Appeals or the Seventh Circuit Court of Appeals on the question of whether the Players II was a vessel "in navigation." *Grobe*, **supra;** *see also*, *Weaver v. Hollywood Casino-Aurora, Inc.*, 255 F.3d 379, 387-388 (7th Cir. 2001) (where casino is indefinitely moored "its status as a vessel in navigation would be doubtful.")

16. This motion is brought pursuant to new definitive legal authority on the issue of whether the Players Ii was a vessel "in navigation." *Grobe; Weaver*, **supra**.

17. Players files herewith a memorandum in support of this motion which is incorporated herein by this reference.

WHEREFORE, defendant/third-party plaintiff prays this Court enter summary judgment in its favor and against plaintiffs, for costs herein expended, and for such other and further relief as is just and proper.

Respectfully submitted,

FOX GALVIN, LLC

/s/ Stephen P. Niemira

Ronald E. Fox
Stephen P. Niemira
One Memorial Drive,
Eighth Floor
St. Louis, Missouri 63102
(314) 588-7000
(314) 588-1965 (Facsimile)

Attorneys for Defendants/
Third Party Plaintiffs

EXHIBIT 8

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
BENTON DIVISION

JOHN HOWARD, ROY FORD, JUDY GRIMES, BONNIE SHELTON, WILMA LOTT, JOAN MISCH, VIRGINIA MADDEN, PATRICIA LEDSINGER, VALERIE CARROLL, SHIRLEY JOHNSON, GRACE ALEXANDER, JERRIE BELCHER, CECELIA COOK, ANITA CLAYTON, TROY DAVIS, DEBRA EASTWOOD, JOHN GREGG, THOMAS GRIMES, DANA HOCKER, BRECIA HUIE, KATHY LAY, KENNETH LITCHFORD, ROBIN LITTLE, GEORGE MABREY, J. RICHARD MATHENY, KEITH PLUMLEE, KITTY POLOVINA, ZENON RODRIGUEZ, JULIA SALYER, PAMULA SHINN, PAMELA TAYLOR BELINDA THOMAS, MICHAEL THOMAS NANCY WILLIAMS, LORI WURTH	)	**No: 00-4321 GPM**
Plaintiffs,	)	
vs	)	

SOUTHERN ILLINOIS RIVERBOAT/CASINO CRUISES, INC., d/b/a Players Riverboat Casino; and HARRAH'S ILLINOIS CORPORATION, a Nevada Corporation,

Defendants/Third Party Plaintiffs,

vs

TRIANGLE INSULATION AND SHEET METAL COMPANY

State of Illinois)
) SS
County of Madison)

AFFIDAVIT

1. I was employed on the M/V Players II, from February 1993, to approximately July 28 2000.

2. During the time period in question I was assigned by Defendant to work as a casino supervisor on board the M/V Players II.

3. I spent all of my time working for Defendant on board the M/V Players II.

4. During the time that the vessel was allowed to remain dockside, passengers were admitted on board to gamble every day.

5. I was classified as a full time employee.

6 I received maintenance and cure benefits from the M/V Players II from July 28, 2000 to February 2001.

/s/ John Howard

Subscribed and sworn to before me this 3rd day of June, 2002.

/s/ Debra A. Ramirez

My Commission Expires:
7/7/03

"OFFICIAL SEAL"
Debra A. Ramirez
Notary Public – State
Of Illinois
My Commission Expires
07/07/2003

EXHIBIT A

AFFIDAVIT OF JEFF PFEIFFER

COMES NOW Jeff Pfeiffer, of lawful age and competent to testify to the matters herein, and having been duly sworn upon his oath, states as follows:

1. I am employed as the Assistant General Manager of Players Island Casino, the gaming facility owned and operated by Southern Illinois Riverboat Casino/Cruises, Inc. (hereinafter referred to as Players). I have been Assistant General Manager since May of 2000. From June of 1996 to February of 1999 I was Vice-President of Marketing for Players. From March of 1999 until May of 2000, I was Vice-President of Operations and Marketing. I am personally knowledgeable concerning the physical operations and status of the M/V Players II, which was the vessel operated as Players Island Casino.

2. As of July 28-29, 2000, Players owned the Players II, a casino located on the Ohio River in Massac County, Illinois. The Players II was removed from service, as a casino vessel in Metropolis as of September 11, 2001.

3. At the time of Plaintiffs alleged injuries (July 28-29, 2000), the casino was not transporting passengers, cargo or equipment, and had not done so for over a year before the alleged incident which allegedly caused plaintiffs injuries.

4. The Players II Casino had not cruised since June 26, 1999, when a change in Illinois law allowed gaming on dockside casinos.

5. Because cruising was no longer required under Illinois laws and regulations pertaining to gaming, after June 26, 1999, Players had no intention to resume cruising with the Players II.

6. From June 26, 1999, until the casino is sold, it will be moored to a dock consisting of two connected barges which were permanently attached to the shore.

7. While in operation after June 26, 1999, the casino was connected to land based utilities such as electricity, telephone, computer surveillance hard-lines, water and sewer.

8. After June 26, 1999, even though the casino was no longer navigating the Ohio River as part of casino operations, the Players II remained licensed and classified as a passenger vessel with the United States Coast Guard, was equipped with firefighting equipment and safety equipment, and had internal diesel engines for propulsion.

9. After June 26, 1999, even though the casino was no longer navigating the Ohio River as part of casino

operations, Players employed a captain and crew qualified to move the casino if necessary.

10. After June 26, 1999, the casino left its moorings no more than once every three months for propulsion testing mandated by the United States Coast Guard. Propulsion testing was completed with no passengers aboard.

11. After June 26, 1999, in order for the casino to leave the dock, all utility lines had to be disconnected, three ramps had to be disconnected and raised, and numerous cables and tie-off points and connections, which held the casino in place, had to be disconnected by a process requiring the use of numerous tools.

FURTHER AFFIANT SAYETH NOT.

/s/ Jeff Pfeiffer Jeff Pfeiffer

Subscribed and sworn to before me, a notary public, this day of 13th March, 2002.

/s/ Vicki J. Boren
Notary Public

My Commission Expires:

OFFICIAL SEAL
VICKI J BOREN
NOTARY PUBLIC STATE
OF ILLINOIS
MY COMMISSION EXP.
JAN. 26, 2005

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
BENTON DIVISION

JOHN HOWARD, *et al.*, Plaintiffs,	)	
vs.	)	Case No. 00-4321-GPM
SOUTHERN ILLINOIS RIVERBOAT/ CASINO CRUISES, INC., d/b/a Players Riverboat Casino; and HARRAH'S ILLINOIS CORPORATION, a Nevada Corporation, Defendants/Third Party Plaintiffs,	)	
vs.	)	
TRIANGLE INSULATION AND SHEET METAL COMPANY, Third Party Defendant.	)	

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

On February 5, 2001, Players filed a limitation of liability proceeding in this Court (S.D. Ill. Cause No. 0 1-4040-GPM, consolidated with civil No. 00-432 1-GPM). This Court granted Players' motion to voluntarily dismiss the limitation of liability proceeding on September 25, 2001. In November of 2001, some two months after dismissal of the limitation of liability action, the Illinois Court of Appeals issued an opinion in the case of *Grobe v. Hollywood Casino-Aurora. Inc.,* 759 N.E.2d 154 (Ill. App. 2nd Dist. 2001). This new decision of the Illinois Court of Appeals redefines the issue of whether a permanently moored casino vessel in Illinois is a vessel "in navigation" for purposes of determining whether employees of the

casino are seamen under the Jones Act or general maritime law.

Under this new decision, which applies sound principles of admiralty jurisprudence, employees of Players are not seamen for purposes of the Jones Act or general maritime law, and cannot claim seaman status in pursuing claims against their employer. As such, this Court should enter summary judgment on plaintiffs' claims in this action.

I. FACTS

Plaintiffs were employees of Players on July 28 and 29, 2000, the dates of their alleged injuries.[1] Plaintiffs claim to have been injured while in the performance of their duties as seamen and members of the crew of a vessel in navigation, i.e. the M/V Players II. Plaintiffs' claim to be seamen, and have brought this action for personal injuries against Players under the provisions of 46 U.S.C. § 688 (1994), commonly known as the Jones Act, as well as the general maritime law of the United States.

Players owns the M/V Players II, and until September 11, 2001, operated the Players II as a casino on the Ohio River in Massac County, Illinois. Jeff Pfeiffer has been employed by Players as the Assistant General Manager since May of 2000, and held other positions for defendant including Vice-President of Operations and Marketing from March of 1999 until May of 2000. Mr. Pfeiffer is

[1] This does not apply to plaintiff Mezo, who does not claim to be an employee of Players and does not bring his cause of action as a seaman.

personally knowledgeable concerning the physical operations and status of the Players II casino. Mr. Pfeiffer has provided an affidavit in this matter attesting to the fact that since June 26, 1999, when a change in Illinois law allowed gaming on dockside casinos, the Players II had not cruised as part of casino operations, and had no intention to resume cruising. Mr. Pfeiffer's affidavit is attached hereto as Exhibit A, and incorporated herein by this reference.

Mr. Pfeiffer's affidavit conclusively establishes as a matter of fact that at the time of plaintiffs' alleged injuries, the casino was not transporting passengers, cargo or equipment. Mr. Pfeiffer's affidavit also establishes the following facts which were true between June 26,1999 (when the casino was permanently moored), and September 11, 2001 (when the Players II was removed from service as the casino in Metropolis):

The casino was moored to a dock consisting of two connected barges permanently attached to the shore; the casino was connected to land-based utilities such as electricity, telephone, computer and surveillance hardlines, water and sewer; although no longer cruising as part of casino operations, the casino was licensed and classified as a passenger vessel with the United States Coast Guard; although no longer cruising the river as part of casino operations, the casino was equipped with firefighting equipment and safety equipment and had internal diesel engines for propulsion; although no longer cruising the river as part of casino operations, Players employed a captain and crew qualified to move the casino if necessary; the casino left its moorings only when required by the United States Coast Guard to perform propulsion testing, which testing was performed without passengers aboard

the casino; in order for the casino to leave the dock for propulsion testing, all utility lines had to be disconnected, three ramps had to be disconnected and raised, and numerous cables and tie-off points and connections, which held the casino in place, had to be disconnected by a process requiring the use of numerous tools. (Exhibit A.)

These facts establish beyond dispute that the Players II was not "in navigation" as that term is applied under the Jones Act and general maritime law, such that employees who work on the Players II are not seamen.

II. ARGUMENT

Under FED.R.CIV.P. 56(c), summary judgment is appropriate where the pleadings, depositions and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Here, the pleadings and affidavits on file establish there is no genuine issue as to the fact that the M/V Players II was not "in navigation" for purposes of the Jones Act and general maritime law.

A. When is an employee a "seaman?"

The Jones Act provides, in relevant part:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury. . . . " 46 U.S.C. App. § 688 (1994).

It is recognized that the general purpose of the Jones Act is to provide heightened legal protection to seamen

injured in the course of employment because seamen are exposed to the "perils of sea." *G. Gilmore & C. Black, Law of Admiralty*, § 6-21 at 328-29 (2d ed. 1975). To recover under the Jones Act or general maritime law, a plaintiff must be a seaman. *Grobe v. Hollywood Casino,* 759 N.E.2d 154, 158 (Ill. App. 2nd Dist. 2001), *citing Pavone v. Mississippi Riverboat Amusement Corp.,* 52 F.3d 560, 565 (5th Cir. 1995).

The test for whether an employee is a seaman is two-pronged. *Chandris, Inc. v. Latsis,* 515 U.S. 347, 132 L. Ed. 2d 314, 115 S.Ct. 2172, 2192 (1995). In *Chandris,* the Supreme Court held that in order for an employee to qualify as a seaman (1) the employee's duties must contribute to the fractions of the vessel or to the accomplishment of its mission, and (2) the employee must have a connection to a vessel ***in navigation*** that is substantial in both duration and nature. *Id.*, 515 U.S. at 368, 373 (emphasis added).

B. When is a vessel "in navigation?"

When determining vessel status, courts consider several characteristics: (1) the presence of navigational aids; (2) the presence of lifeboats and other lifesaving equipment; (3) the shape of the bow; (4) the presence of bilge pumps; (5) the presence of crew quarters; and (6) Coast Guard registration. *Grobe,* at 159.

However, for a vessel to be "in navigation," its purpose must be, to some reasonable degree, the transportation of passengers, cargo, or equipment from place to place across navigable waters. *Grobe* at 159, *citing Johnson v. John F. Beasley Construction Co.,* 742 F.2d 1054, 1063 (7th Cir. 1984). Also relevant in determining whether a vessel is "in

navigation" is whether the owner intends to move the structure on a regular basis and the length of time the structure has remained stationary. *Grobe* at 159, *citing Gremillion v. Gulf Coast Catering Co.*, 904 F.2d 290, 293 (5th Cir. 1990).

Normally, the question of whether a vessel is "in navigation" is a question of fact reserved for the jury. *Grobe* at 159, *citing Chandris,* 515 U.S. at 373. "However, removing the issue from the jury's consideration is appropriate where the facts and the law support only one conclusion." *Id.*

C. The *Grobe* decision.

Recently the Illinois Court of Appeals addressed the question of whether an indefinitely moored floating casino is a vessel "in navigation." *Grobe v. Hollywood Casino,* 759 N.E.2d 154 (Ill. App. 2nd Dist. 2001). In *Grobe,* the defendant operated two casino vessels in northern Illinois. The vessels at issue had characteristics of a vessel in navigation in that they were licensed and classified as passenger vessels with the United States Coast Guard, equipped with fire-fighting and safety equipment, had internal diesel engines for propulsion, employed a captain and crew qualified to move the vessels, and were capable of cruising. The vessels, however, were connected to land-based utilities such as electricity, telephone, and computer surveillance hard lines, and had not cruised or left their moorings since the change in Illinois law allowed casino vessels to operate dockside. Further, the casino operators had no intention to resume cruising.

Under these facts, *Grobe* held that as of the time plaintiff was injured (two months after the vessel on which

he worked had been permanently moored), the vessel was not "in navigation," because it was not transporting passengers, cargo or equipment. Plaintiff was therefore prohibited from seeking recovery under the Jones Act. *Id.* at 156-57.

D. Cases upon which *Grobe* relies.

The court in *Grobe* is the first Illinois court to consider the question of whether an indefinitely or permanently moored floating casino is a vessel "in navigation." *Id.* at 159. Although this is the first case directly applicable to the Players II, courts in other jurisdictions have deemed vessels not "in navigation" under similar circumstances. *Id.*

For example, in *Pavone v. Mississippi Amusement Corp.*, 52 F.3d 560 (5th Cir. 1995), the riverboat casino at issue was an indefinitely moored, shore-side floating casino, located on a river. The casino possessed characteristics of a vessel in navigation such as bilge pumps, it could be disconnected from its dock with minimal effort, and was authorized by the Coast Guard to travel on the U.S. waterways. *Pavone,* at 564. The court found as a matter of law, however, that the riverboat was a non-vessel, withdrawn from navigation, because it was moored to the shore in a "semipermanent or indefinite manner." *Pavone,* at 564. The summary judgments on plaintiffs' claims as seamen were therefore affirmed.

In *Chase v. Louisiana Riverboat Gaming Partnership,* 709 So.2d 904 (La.App.1998), the riverboat casino at issue was equipped with navigational aids, safety equipment, bilge pumps, a propulsion system, was licensed by the Coast Guard, was permanently moored in a containment

pond, and planned to leave its mooring for a hull inspection at some time in the future. Despite these vessel characteristics, the court found as a matter of law that the casino had been withdrawn from navigation "because it had been permanently moored, had not left is [sic] containment pond to date, and did not transport passengers or cargo." *Grobe* at 160, *citing Chase,* at 910.

The United States Court of Appeals for the Seventh Circuit has stated that if a casino "were indefinitely moored (as the record suggests it is now) **its status as a vessel in navigation would be doubtful.**" *Weaver v. Hollywood Casino-Aurora, Inc.,* 255 F.3d 379, 387-88 (7th Cir. 2001) (emphasis added). This opinion was issued in June of 2001, approximately six months after the limitation of liability pleadings were filed in this case. Although the same issue was not squarely presented to the Seventh Circuit in *Weaver,* the quoted passage from the Seventh Circuit's opinion gives clear indication of how the Seventh Circuit would view the status of the Players II in the present case. *Weaver* shows the Seventh Circuit would hold the Players II is not a vessel "in navigation," and shows that summary judgment as requested herein should be entered and would be affirmed on appeal.

E. The M/V Players H was not a vessel "in navigation."

As of July 28-29, 2000, the date of the alleged injuries, the Players II did not transport passengers, cargo or equipment across navigable waters, and had not done so since June of 1999 when Illinois law changed to allow dockside gaming. From June of 1999 until the Players II was removed from service as a casino at the Metropolis

facility in September of 2001, the Players II traversed the Ohio River no more than once every three months, and then only to conduct Coast Guard mandated propulsion testing. During propulsion testing, the Players II did not have as its purpose to transport passengers, cargo or equipment from place to place across navigable waters. The facts of the present case, therefore, are virtually identical to those set forth in *Grobe* and the cases cited therein. *Grobe* and the Seventh Circuit's pronouncement in *Weaver* control the present case. Under *Grobe* and *Weaver,* the Players II was not "in navigation" at the time of plaintiffs' alleged injuries, and plaintiffs therefore cannot, as a matter of law, recover as seamen.

CONCLUSION

WHEREFORE, defendants/third-party plaintiff Southern Illinois Riverboat Casino/Cruises, Inc., respectfully moves this Court to enter summary judgment in its favor and against plaintiffs, for their costs herein expended, and for such other and further relief as is just and proper in the circumstances.

Respectfully submitted,

FOX GALVIN, LLC

By: /s/ Stephen P. Niemira

Ronald E. Fox
Stephen P. Niemira
One Memorial Drive, Eighth Floor
St. Louis, Missouri 63102
(314) 588-7000
(314) 588-1965 (Facsimile)

Attorneys for Defendants/
Third Party Plaintiffs

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing was sent via the United States Postal Service, first class postage prepaid, to Mr. Gerard B. Schneller, The Lakin Law Firm, P.C., attorneys for Plaintiffs John Howard, *et al.*, 301 Evans Avenue, P.O. Box 229, Wood River, Illinois 62095-0229, Mr. Sandor Korein, Can, Korein, Tillery, LLC, attorneys for Plaintiff Howard Mezo, 412 Missouri Avenue, East St. Louis, Illinois 62201 and Mr. Gordon R. Broom, Burroughs, Hepler, Broom, MacDonald, Hebrank & True, attorneys for Third Party Defendant Triangle, P.O. Box 510, Mark Twain Plaza, 103 West Vandalia Street, Suite 300, Edwardsville, IL 62025-1364 this 8th day of May, 2002.

/s/ [Illegible]